United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

253

No. 21,520

STRATHMORE SECURITIES, INC., ALDUS H. TURNER, JR., RONALD D. TURNER AND T. THEODORE TURNER,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE SECURITIES AND EXCHANGE COMMISSION

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Pertinent Dates in the Proceedings Below

1. The Order for Proceeding was issued on January 7, 1965.
2. The hearing commenced on February 1, 1965.
3. The hearing was recessed from February 12 to February 17, 1965.
4. The hearing was recessed from April 30 to May 6, 1965.
5. The hearing was recessed from May 6 to June 21, 1965.
6. The hearing was recessed from June 22 to July 7, 1965.
7. The Hearing Examiner's Initial Decision was issued on June 29, 1966.
8. Petitioner's application to the Commission seeking review of the Hearing Examiner's Initial Decision was filed on August 16, 1966.
9. The Findings, Opinion and Order of the Commission was issued on December 13, 1967.

TRANSCRIPT OF HEARINGS
Proceedings on February 1, 1965

Mr. Schuchert (Counsel for Petitioners)

* * *

[27] The first of these motions is a motion for an order to have the Staff return the books and records of Strathmore Securities, to suppress them as evidence, and for a postponement of proceedings.

Hearing Examiner Feiler: And that's all?

Mr. Schuchert: And in that connection I have a brief, or memorandum, that goes with that.

Hearing Examiner Feiler: All right.

Mr. Schuchert: The second motion, which I will [28] discuss later, is a motion for a more definite statement of specified matters of fact, under Rules of Practice 8(d).

Hearing Examiner Feiler: These are quite voluminous papers. Why don't we take a little while to look them over, and then listen to your argument.

Mr. Schuchert: Very well, sir.

Hearing Examiner Feiler: Have you given copies to all counsel?

Mr. Schuchert: Yes, I have.

Hearing Examiner Feiler: So all the counsel have it.

How about taking about twenty minutes now, until about ten after three? By that time I will have familiarized myself, and we will be ready to go ahead.

Are there any other motions that are going to be presented today?

I don't hear any.

So I will make my ruling and we'll decide what to do next.

We'll take twenty minutes.

(Recess)

Hearing Examiner Feiler: On the record.

Let's proceed with the motion.

Mr. Schief [Counsel for the Division of Trading and Markets]: Mr. Examiner, I haven't had an opportunity to finish reading this.

[29] Hearing Examiner Feiler: All right. We will stay in recess. When you are finished and are ready to proceed, let me know.

Mr. Schief: I won't be much longer.

Hearing Examiner Feiler: Well I won't push you on this.

We'll be off the record.

(Recess)

Hearing Examiner Feiler: On the record.

Now, Mr. Schuchert, is there anything further you want to say about that motion? Let's take first the motion for return of books and records, and to suppress evidence, and for postponement of the proceedings.

Mr. Schuchert: Yes. The first motion, Your Honor, all grows out of the same set of facts and circumstances. We believe that it would be basically unfair, and fundamentally unfair, to require Strathmore Securities, and certain of the other respondents whom I represent, to be required to proceed in these hearings when the books and records—which I see here in the hearing room—have been in the exclusive custody and control of the Commission for, in some cases, as high as one year, and, in other cases, eight months.

Legally and in the law the Commission is not entitled to withhold these books and records. The only [30] way they would have been entitled to withhold them is if they would obtain an appropriate order from some court or other administrative body having the authority of impounding the records.

Now the order for proceedings in this case, under the most pertinent paragraphs, being (d) and (e), set forth charges involving the sale of unregistered stock by registrant, Strathmore Securities, involve violation of the anti-fraud provisions by Strathmore Securities, relate to matters and transactions which were not reflected on the books and records of Strathmore Securities Corporation; and all of these

matters taken together are such that it is absolutely impossible for Strathmore Securities, or A. H. Turner, Jr., the officer of that company, or their salesmen, to enter a proper defense in these proceedings.

Fundamentally the Commission is not entitled to these records. They have been wrongfully withheld.

Now it is true that prior to the time that Mr. A. H. Turner, Jr. was called to testify in the private investigation we made complaint about the fact that the records were not available, and Mr. Schief did cooperate by, I believe, making them available in this room or some similar room in the Federal Building for designated hours, for a designated period of time. The people that we appointed, and who worked for us in attempting to study [31] these records and make our investigation—it resulted in their throwing up their hands and saying "It's impossible for us to do any type of a job where we are bound to do it during designated hours, where we cannot coordinate it with other information in the other records of Strathmore Securities Corporation, and where a member of the Staff is present."

And I have made demand for these records on several occasions. I last discussed this in Washington and requested—oh, I'd say two weeks ago— that they be returned. I was told at that time that they would not be returned, but that some arrangement might be made similar to what had been made before.

This is totally unsatisfactory to me and to my clients. And I think it would be fundamental denial of due process in this case to allow the Commission to go ahead, and the Staff to proceed to present its case, where that case depends upon transactions that are and are not reflected on those books and records, and have those books and records covering complicated and myriad transactions only available to us at the time of cross-examination.

Now the books and records were procured under an agreement whereby members of the Staff signed releases or receipts stating that:

[32] "As per agreement between Joseph S. Schuchert, Jr. and Alexander Brown, Regional Administrator, Securities and Exchange Commission, Washington, all Strathmore Securities, Inc. records are to be returned no later than thirty days from the date of receipt."

And that we are here today, in some cases a year and in other cases eight months later, attempting by order in these proceedings to get these records, I think supports our claim that those records were obtained improperly and through misrepresentation. I think the basis upon which they were obtained, under a representation which has turned out to be a misrepresentation, is sufficient ground for asking for suppression of that evidence.

Now finally, in the event that the Hearing Examiner or the Commission enters an order requiring that these books and records be turned over to us, I believe that we are entitled to some reasonable period of time to study these books and records. After all, the Commission has had them a year and has called several hundred witnesses to prepare their case. We have not had these records available, and we require some reasonable period of time after we get the books back in order to proceed with this hearing.

That's all I have on this one motion.

[33] Hearing Examiner Feiler: Mr. Schief?

Mr. Schief: Again, Mr. Examiner, being served with this motion no more than an hour and twenty minutes ago, and having only spent twenty to twenty-five minutes reading it and attempting to prepare an adequate answer to the many, many statements that Mr. Schuchert and his client have made in that motion, I will make some feeble attempt to meet all of these statements.

I must say at the outset, however, that I am rather shocked that a motion of this nature, on the grounds that it states, has been filed in this proceeding.

First I would like to say I believe Mr. Schuchert is clearly in error with his statement of the law when he says that the Commission has no authority to obtain records required to be kept by a registered broker-dealer and keep those records in its possession during the course of any formal investigation. I do not have the cases with me today, but I do intend to submit a memorandum on that point, if your Honor cares that I do so.

In addition to being clearly in error on the law, the presentation of facts in this motion to suppress this evidence, and for an order to return the books and records, is flagrant absent of many, many facts.

Mr. Schuchert talks about a 30-day arrangement that he has attached a copy thereof to his motion as [34] Exhibit A, and down at the bottom he says—it states, as per agreement between Mr. Schuchert and Mr. Brown, that these records will be returned, after thirty days, by the Commission. I am sure when Mr. Brown authorized Mr. MacMillan to sign that receipt under those terms, Mr. Brown had every intention of complying with that request under a gentlemen's agreement with Mr. Schuchert, as an attorney at the bar.

However, Mr. Brown fully knew that all he had to do was issue a subpena duces tecum at that time, and we would have those records. But attempting to cooperate with Mr. Schuchert, he authorized Mr. MacMillan to sign that agreement with every intention that we would review those records and try to get them back to Mr. Schuchert and his client within thirty days.

Now remember this: that these records that were turned over were not current records, were not records that Mr. Turner and Strathmore Securities needed in its everyday operation. And that has never been alleged ever by Mr. Schuchert. However he says he had at the back of his mind that he would need to use these records because of the prospect, as he says, the prospect that there would be proceedings instituted as a result of the Commission's investigation.

So 'way back in February of 1964 Mr. Schuchert and his [35] client, one year ago, were very much concerned with whether or not there was going to be a proceedings. And certainly everyone here realized that in order to come to that conclusion Mr. Schuchert must have had substantial discussions with his client, Mr. Aullie Turner, Jr., and others.

After the thirty days expired it came to the Staff's attention, Mr. Brown's attention, that we would not be able to comply with that request of thirty days. And there were some discussions with Mr. Schuchert that we would not be able to comply with that request.

Mr. MacMillan and Mr. Stewart spent some time, and were continuing to spend some time, in the offices of Strathmore Securities.

At the time that Mr. Schuchert was informed that this request, or that at least there had been no decision to return the records because of the inability to fully review them by that time, thereafter, on or about August 14, 1964, a subpena was issued to Mr. Auldus Turner, I believe in his capacity as president of Strathmore Securities, requiring his appearance on September 2nd, 1964 in order to testify in the course of the formal investigation in the matter of Strathmore Securities and L. F. Popell.

Mr. Schuchert, after receiving that subpena from his client, telephoned Mr. Brown at the Washington Regional [36] Office, and made arrangements to postpone the interrogation of Mr. Turner so that he would have an opportunity to familiarize himself with the records. And I am going to read to you Mr. Schuchert's statement on September 16th, 1964 during the course of the subsequent interrogation of Mr. Turner.

And this is the pertinent part, on page 6:

> "Mr. Schuchert: Yes, I do.
>
> "This hearing, or Mr. Turner's testimony, was originally scheduled pursuant to this subpena for September 2, 1964. At that time I requested through Mr.

> Alexander Brown of the Washington Regional Office that the taking of Mr. Turner's testimony be continued for the reason that we required more time in order to familiarize ourselves and himself with (1) in general the various transactions in the L.F.Popell Company, and, more particularly, the items which are set forth in your subpena duces tecum. Mr. Brown was gracious enough to arrange for a postponement until today."—"today" being September 16, 1964.

Now pursuant to the arrangement for postponement there was no further arrangement because Mr. Schuchert and Mr. Brown evidently had made no further agreement on the return of the books and records up until that point. [37] There was no further arrangement for the return of the books and records under any agreeable conditions.

So that on September 16, 1964 Mr. Schuchert represented that he and his client were unable to proceed with the investigation because they had no access to the records, which were broker-dealer records, in the hands of the Commission, the Staff of the Commission. And Mr. Schuchert requested further time—a further continuance; excuse me—for Mr. Turner's appearance to testify in the investigation until he had had an opportunity to review those books and records.

So that on September 16, 1964 I entered into an agreement, pursuant to Mr. Brown's authority, with Mr. Schuchert, to make the books and records that you see here in this courtroom today, available in the room adjacent to this room.

After asking Mr. Schuchert how much time he felt the would need, Mr. Schuchert, I think, stated—I can't find it specifically on which page it is in this transcript, but he did state that he would need approximately two weeks, which was agreed to.

The Staff of the Commission then, pursuant to this agreement, pursuant to Mr. Schuchert's statement—and, incidentally, that was in the presence of Mr. Turner—that he would need two weeks, the

Staff of the Commission [38] had one of its securities investigators obtain a station wagon, a government station wagon, place all these books and records in the station wagon, and bring them, pursuant to appointment with Mr. Schuchert, to the room adjacent to this one. And they were placed in that room under instructions for that investigator to allow Mr. Schuchert or anyone he designated, to review those books and records during the hours that he requested; and if he requested the hours to go beyond the normal working hours, that it would be all right, however the investigator should call me in Washington so that we could make whatever further arrangements that we would have to with Mr. Schuchert.

So that when Mr. Schuchert talks in his motion that these books and records were made available only on a restricted basis and a restricted schedule, I submit that that is entirely incorrect.

Now in addition to making these available, and keeping this securities investigator here in this room—not in the room where the books were—during the normal business hours, we realized from our past experience in matters of this type that we at a later date would probably be confronted with what we are confronted with today. So I instructed that securities investigator, Mr. Robert McGovern, to keep a list of the time spent by [39] Mr. Schuchert and his representatives reviewing those books, since he was the gentleman who had requested that they be available. And I would like to read into the record at this time just the time that these gentlemen spent; notwithstanding their continued representations that they needed so much time to prepare Mr. Turner to testify in an investigation—the president of a registered stock broker with the Commission.

The first week that these records were available, the first week that the records were placed in the next room:

On September 28th, Mr. Darby and Miss Bishop spent one hour and thirty-five minutes reviewing those records.

On the next day Mr. Schuchert himself appeared, being September 29th, 1964, and spent twenty minutes in these two rooms.

The following day, September 30th, Miss Bishop spent thirty-two minutes.

And I want to point out to you that the 28th of September is a Tuesday. We had made these records available, pursuant to agreement with Mr. Schuchert, on Monday, September 27th, beginning at 9:00 o'clock—or 10:00 o'clock; excuse me—and I think there is a record in the file to indicate that.

[40] So that on Tuesday, Wednesday and Thursday Mr. Schuchert and his representatives spent a grand total of two hours and twenty-seven minutes reviewing the records. They spent no time on Friday of that week.

The following week: On October 5th, either a Miss or Mrs. Stutt and Miss Bishop spent four hours and thirty minutes reviewing the records.

The following day was Tuesday, October 6th—excuse me; not Tuesday; it was October 6th—Miss Stutt spent three hours and fifty-five minutes.

So that during the second week they spent a grand total of eight hours and twenty-five minutes.

On the third week, the third week beginning October 12th, no representatives of Mr. Schuchert's staff, or Strathmore Securities, appeared in that room, although we had Mr. McGovern sitting in this room with the doors wide open waiting for someone to appear.

Then I called Mr Schuchert and said, that pursuant to our agreement, Mr. Schuchert, we expect to have your client, Mr. Aullie Turner—Auldus H. Turner, Jr.; excuse me—appear here in Pittsburgh pursuant to the original subpena on October 20, 1964. And Mr. Schuchert and Mr. Turner appeared on that day. And Mr. Schuchert opened the investigative proceedings on that day with a statement that he was sorry to put the government to that [41] type of trouble.

He appreciated the cooperation in making these books available, and he had come to the conclusion from his gathering of evidence in this case, and his knowledge of the case, and the complexities of the case, that he was going to have to advise his client to not answer any questions on the grounds that they would incriminate him.

Mr. Schuchert: I object, Mr. Examiner, to an argument on the motion bringing forth an assertion that this man resorted to his Constitutional rights. I don't think it is supportive of anything here that he is trying to urge in answer to my argument.

Hearing Examiner Feiler: I think the only thing that we should do in this oral argument is to avoid matters of evidence. The negotiations between counsel I suppose are all right, but I don't want to get into what is in the transcript. That isn't before me right now.

And I would say this: that whatever is in the transcript—I will make a general statement, it always has to come in somewhere in the proceedings; that statements by counsel are not evidence, unless there is agreement.

Mr. Schuchert: I understand that, sir; but inasmuch as Mr. Turner has taken no position in these proceedings, and hasn't attempted to invoke any Constitutional rights in these proceedings, I think that Mr. Schief's [42] mention of his taking advantage of his Constitutional rights in a private investigation constitutes a fundamental error. I think it is highly prejudicial to your Hearing Examiner; I think it will affect his ability to fairly and impartially judge the issues. And on the strength of that remark I request that these hearings be dismissed.

Hearing Examiner Feiler: Motion denied. I have already commented on that.

Let's go ahead and be as quick as we can, now.

Mr. Schief: Beyond that—

Hearing Examiner Feiler: The only question in what you are pursuing is, regardless of what happened in any testimony or arrange-

ments, to what extent these books and records were made available or actually used. You were talking on that point; so let's stick to that.

Mr. Schief: That's right. Exactly.

I will certainly comply with your ruling, Mr. Examiner.

Going beyond that period of time, subsequent to making these books and records available and bringing them up for the three-week period back in September and October of 1964—and not in November of '64, as Mr. Schuchert has stated in his motion; besides making them available to him at that point, besides Mr. Schuchert's statements all during [43] the investigation that he needed these books and records, when he left the hearing room on October 20th, 1964 and until he appeared with Mr. Turner in Washington on January 12, 1965, after these proceedings were instituted, we heard no further word that the arrangement that was made for Mr. Schuchert to review those books and records in the room adjacent was not adequate and did not serve his purposes.

On that day, January 12, 1965, in a conference in the Washington Regional Office, Mr Schuchert did mention that he wanted access to the books and records again. Mr. Brown and Mr. Stewart told him that we would be more than willing, in spite of the cost again to the staff, and in spite of what we considered a good faith use of those records when they were last made available to him, we would make them available to him again under the same conditions.

Mr. Schuchert indicated at that time that he didn't think that those arrangements would be satisfactory.

And that is the first time that I knew that Mr. Schuchert felt that those arrangements were not satisfactory.

Now I point this out to you, Mr. Examiner, that in addition to making these books and records available, the amount of time that we have spent, and the effort that we have spent, and the cost of doing what the staff has [44] done, and in view of the apparent

lack of interest and the failure to notify us that the arrangements were unsatisfactory, I definitely believe that it is the eleventh hour in this case for Mr. Schuchert on the first day of hearing to come in to this hearing and say he has been wronged, and his client has been wronged, and that these books and records that are required by law to be kept by registered broker-dealers were not made available as he would like them to be made available.

Obviously, Mr. Examiner, the Staff does not always agree with thoughts of Respondent counsel. And we felt—and we had no information to feel otherwise—that Mr. Schuchert was perfectly satisfied with this arrangement; because back in August he had agreed to it.

Now on this basis my remarks are that Mr. Schuchert has presented no basis for a complete return of these records, and I am not sure from his motion whether or not he is asking for complete control and dominion of the records, but I am assuming that that is what he is asking for. I think he has shown no basis for that, in view of what has gone before.

And I again renew the offer to make these books and records available in a room in this building which is suitable to Mr. Schuchert, or anyone, to review the records that he designates during the course of these proceedings. [45] But I do not believe that he has made a sufficient showing to return the records to his complete control, or to postpone this case, or delay it any further, so that he can review these records. He has had the opportunity and he didn't take advantage of it, back in October and September.

And we believe that the best course of conduct, or course of orderly proceedings, would be to move forward in this case, and have these records available to Mr. Schuchert and his representatives during the course of the proceedings for their review.

Thank you.

Hearing Examiner Feiler: Is there anything further on this?

Mr. Schuchert: Yes, I have something further, Mr. Examiner.

It's inconceivable to me how Mr. Schief can spend a half an hour detailing how these records have been available to my client and myself when he has been sitting with the Commission, with some of them, for one year, and others for eight months. And we are the people who must defend the charges.

Now he refers to this arrangement that I had with Mr. Brown as a request, my request that those records be returned in thirty days. As I interpret those exhibits, Mr. Examiner, that certainly wasn't a request; that was an [46] agreement, an agreement that the Commission acknowledged when they signed those receipts. They stated they would return these records within thirty days.

If the staff of an administrative body of the United States Government can't be relied upon, above all others, to comply with such a clear cut agreement, I don't know who can.

Now Mr. Schief knows—and let me first state that he has recited mostly the fact that for a period of a few weeks these records were made available in this room. They were made available, Mr. Examiner, for the purpose of preparing Mr. Turner to testify in a private proceeding; not for the purpose of enabling us to meet the charges of an order here for proceedings charging sales of unregistered stock in violation of the anti-fraud section. Notwithstanding that fact—and Mr. Schief failed to bring that out: he knows; he has the knowledge, as does Mr. Stewart, of the Commission; that we had engaged a Mr. Darby as an investigator in this matter; that Mr. Darby was formerly a staff member of the Commission; that Mr. Darby came to Pittsburgh to embark upon this investigation and a review of these records, and he told me and reported to me that the arrangements under which they were deposited here, with someone from the Commission present, and with the other records of [47] the company down at Strathmore Securities, was not practical; that he could not work under those conditions.

After the second week, Mr. Schief knows that Mr. Darby had to terminate his work for us then because his wife was hospitalized

with an emergency operation, and we were unable to have the benefit of Mr. Darby's services during a major portion of that time where Mr. Schief introduced time tables to show who was in here for certain periods of time.

Your Honor, I don't know anything in the law—I think the Securities Act and the regulations say that a registered broker-dealer must keep available records for the inspection of the representatives of the Commission: that is the language of the Regulation and the Act. And there is nothing in the Act, nor do I know of any cases, which allows the Commission to come in, appropriate a broker-dealer's records, keep them for eight months to a year, and then file a charge against him and say "You have three weeks to come in here and defend yourself."

And it is a matter of fact, and your Examiner has probably had sufficient experience to know that the bulk of the testimony that will come into this case will come in connection with the books and records of this broker-dealer.

Now I strongly protest, Mr. Examiner, that it is [48] impossible for me to prepare an adequate defense for this gentleman or for Strathmore Securities based upon the unfair way in which our records have been withheld from us.

An arrangement to make them available over here is not satisfactory to me. These are the books and records of Strathmore Securities Corporation. They have an absolute right to those books and records. Mr. Turner has offered on numerous occasions to have photostats of all of these records made at his expense, and this request was denied by the Commission.

So I submit, Mr. Examiner, that you enter an order requiring the Commission to return the records, and give this respondent an opportunity to make adequate study of the records so that we can prepare a defense.

Hearing Examiner Feiler: Well there are two questions here, as I see it: one is whether the Division has the right to hold onto

the records obtained in the course of an investigation by subpena; and the other one is a question of reasonable opportunity to prepare, which all parties are entitled to have.

I had nothing to do with the investigation conducted in this case, nor did I issue that subpena to which the records were produced. And I seriously doubt that I have the power to intervene in the Commission's investigative processes by, say, issuing an order to return the [49] books so obtained. On the other hand, I do have a duty and obligation to see that there is a fair hearing, an obligation to prepare.

So I want to consider that question primarily.

I see that there is a sort of a handtruck full of records over in the corner.

First of all, Mr. Schief, having finished your investigation, do you need all these books and records, or can some of them be released without jeopardizing your case at all?

Mr. Schief: Well, sir,–

Hearing Examiner Feiler: It's obvious to me we're going to talk about the transactions of this registrant, and maybe others, in a particular stock, and in particular customers' accounts probably. And I wonder–you're probably going to have that summarized, or at least probably it can be stipulated to. But, in other words, can we cut this down? Can we cut our problem down?

Mr. Schief: Can we return some of them and retain others–is this what you are saying?

Hearing Examiner Feiler: What I'm trying to say is this: What is the heart of this? How much of those records, first, really play a part in this case? Do all of those things on the truck play a part?

Mr. Schief: Well all of those things on the truck [50] are not Strathmore records. The majority of them are. I would say that there are certain portions of those records that do have some bearing on the underlying–or are underlying basic documents, to records and schedules that we intend to introduce into this case.

Now, if I may: obviously, since they are underlying documents, and we don't intend to introduce those documents into evidence, we, as a matter of course, when we offer schedules and charts, and so forth, offer them with the understanding that they can be stricken if it is shown that they are inaccurate, or otherwise. And under those circumstances I feel that the arrangement for moving forward is still suitable: briefly, again, that we don't intend to offer those documents on the cart into evidence, and that they are available, and will continue to be available, for cross-examination upon the presentation of any schedules or charts or so forth as to accuracy or otherwise.

Hearing Examiner Feiler: I think we would make a great deal of progress if at some convenient time you disclose what you intend to put in by way of documentary evidence from the books and records of the company. If you have copies of those schedules it seems to me you could say to other counsel: "Look, here is a copy of what we intend to put in, the transactions by the registrant in this stock, and on the dates, and our summary of what it [51] adds up to.

"Take it and look at it. If you have any disagreement with the computations or something, let us know. If you don't let's get it in by stipulation." Couldn't that be worked out Mr. Schuchert?

Mr. Schuchert: Well it may or may not be worked out.

Mr. Examiner, I don't want to make things unduly difficult for you in these proceedings, but as Mr. Schief well knows part of the discussions I had with members of the staff in Washington, D.C. involved the fundamental question. That is, we as respondents were required to defend the charges set forth in this order of proceedings.

At the same time the staff acknowledges and we know that an investigation is continuing and there is a strong possibility that further action of a criminal nature may be brought.

Now as I told the staff in Washington D.C., this would substantially affect the way I try this case because if there is a strong likeli-

hood of criminal proceedings arising on the same subject matter, I must be extremely careful in these proceedings, not to consent virtually to anything without the most thorough type of examination.

Now this is why I believe it is doubly important that my motion—or this is why I believe my motion has more [52] taking those factors into consideration.

In connection with your suggestion I had prepared a motion for a more definite statement of fact. I believe if the commission furnished the information that is requested in this statement—and it largely relates to the identification of individuals, the dates of transactions, the number of shares it amounts to, money involved; then I think my task would be substantially reduced in the time required to review these books and records in order to defend these proceedings.

Hearing Examiner Feiler: Well, I think I'll make this ruling at this time. As I said, I have strong reservations. However, I have the power to direct that the books and records be returned. Counsel for the division has asked for some more time to look up authorities to see whether there is a right to hold on to those records. I would give him more time on that.

Do you think you could be ready on that particular point by Thursday or Friday, Mr. Schief? You'll probably have to get in touch with your office.

Mr. Schief: Yes. I think there are some—the only problem being Mr. Examiner, that there is not an over-abundant supply of SEC reports in this area. I think the only public place is the county library. I will make an attempt to do some research there during the [53] evening.

Hearing Examiner Feiler: You might also check with your people in Washington.

Mr. Schief: Yes, I expect to.

Hearing Examiner Feiler: I'm not telling you what to do.

Mr. Schief: Yes; sure.

Hearing Examiner Feiler: As to whether they now have any strong objections. We may be arguing about something that is—that there is not strong feeling; although I gather that there is.

So let me hold that point open until Thursday or Friday. But that is without prejudice. If counsel for these respondents wants to press this before the Commission.

Mr. Schuchert: Can you certify this motion to the Commission?

Hearing Examiner Feiler: Well I don't want to do that until we sort of had a concluding argument on it. We'll have that later in the week. But if you would rather go ahead and push it, you can address yourself directly to the Commission.

As far as I'm concerned on that matter, I would like to hold off until Thursday or Friday. We'll check on that later.

[54] Also I would like counsel for the Division to see if we could cut down the problem here by reviewing these schedules or whatever evidence he intends to produce on the record, and see to what extent it can be advanced, showing schedules, charts, or whatever you intend to use.

It seems to me that if certain entries are in the books, there ought to be agreement that the entries are there without waiving any objection on materiality, relevancy or anything else.

There should be no reason to go page by page through a ledger if there is no question that the ledger shows certain transactions in this particular stock, as the ledgers undoubtedly will.

So why don't you think about that Mr. Schief. Maybe we could cut through the underbush on that.

I think that's about all the ruling I could make now, except for this observation, along the line on what we were discussing before; spending most of our time on that opportunity to look at the records from the standpoint of conducting a fair hearing, which is my responsibility.

If this question of turnover is settled regardless of how it is settled, when we get into the question of testimony or exhibits about written records, [55] I will see that—according to my best judgment—that all counsel and the parties are afforded a proper opportunity to prepare for cross examination, or if they need additional time when the time comes to present their own evidence, I'll consider applications then.

In other words, if the schedules are presented and counsel was—counsel wants time to look at them and check the records, I'm amenable on that.

Mr Schief: We don't intend to offer any schedules until towards the end of the trial, Mr. Examiner.

There won't be any schedules offered at the early stages of this trial.

Hearing Examiner Feiler: I imagined it would be something like that. Of course the earlier counsel sees those the more opportunity they'll have to do whatever checking they want to do. Some spot checking or have someone check it in another office here.

Maybe we are arguing about a problem that is really non existent.

All right. That's the only ruling I want to make on that series of motions. I'm really deferring the final determination until Thursday or Friday.

Mr. Schuchert: How about the motion for a Bill of Particulars?

* * *

[212] Proceedings on February 2, 1965

ALDUS H. TURNER, Jr.

DIRECT EXAMINATION

By Mr. Schief:

Q. Now would you please tell us, Mr. Turner, what your present occupation is?

Hearing Examiner Feiler: Do you want his full name and address?

Mr. Schief: I'm sorry. I thought you already [213] had that.

By Mr. Schief:

Q. Would you please give your full name and your address? A. Auldus H. Turner, Jr. 174 Reed Drive, Pittsburgh 5, Pennsylvania.

Q. And that is your home address, is that right? A. (Nodding affirmatively).

Q. And what is your business address? A. 605 Park Building, Pittsburgh 22.

Q. And is that the address of Strathmore Securities? A. Yes.

Q. Now what is your present occupation? A. Stock broker.

Q. In what capacity? A. I am a broker-dealer registered with the Pennsylvania Securities Commission and the Securities and Exchange Commission.

Q. Are you presently the president of Strathmore Securities? A. Yes.

* * *

[216] Q. * * * Do you know Leo Popell?

(Conference between the witness and his counsel.)

Mr. Schief: I just think the record should show that Mr. Turner has taken a few minutes to consult with counsel.

Hearing Examiner Feiler: What is your answer?

Mr. Schief: There is a question pending.

Hearing Examiner Feiler: Yes, I know. I asked for his answer.

The Witness: I refuse to answer under the First, Fifth and Sixth Amendments to the Constitution, because [217] my answer may tend to incriminate me.

By Mr. Schief:

Q. Should we ask you any further questions in connection with Mr. Leo Popell or the stock of L. F. Popell Company, Inc. would you also invoke the privileges that you have claimed, in light of any further questions on those matters?

(Conference between the witness and his counsel.)

A. At this time I would refuse to answer under the First, Fifth and Sixth Amendments to the Constitution on any further questions along this line.

Hearing Examiner Feiler: I think that is your answer.

Mr. Schuchert: Mr. Examiner, for the record, I have instructed the witness, of course, as to his rights. Part of those rights, in addition to the Fifth Amendment, relate to a fair trial in these proceedings. And upon the refusal to return to Strathmore Securities, Inc. the books and records which have been held by the Commission for eight months and for one year, I believe that under these circumstances it is impossible for him to have a fair hearing. It is impossible for him to properly testify.

And in addition to his right not to incriminate himself under the Fifth Amendment, I am also urging it on [218] these other grounds.

* * *

[716]

Proceedings on February 5, 1965

Hearing Examiner Feiler: On the record.

Let the record show that at the beginning of our session last Monday we had presented for consideration two motions by Mr. Schuchert, but one in particular was a motion for an order to return the books and records of his client, Strathmore Securities, Inc., and,

coupled with that, to suppress evidence, and for postponement of the proceedings. We heard oral argument and then counsel for the Division made answer, but claimed surprise in not knowing about it; and, being unable at that time to put his hands on authorities, I said I would postpone hearing on that motion until either yesterday or today when we finished with the witness we just finished. And this is the time.

So if you have anything further on this, Mr. Schief, I will be glad to hear you.

Mr. Schuchert: Mr. Examiner, if I may, on behalf of the motion, I think the facts presented by both sides have already been put on the record. And all of the statements of Mr. Schief about the availability of those records during that period of time, and the fact that our personnel only used them for such-and-such a time are agreed, there is no question about that.

The only thing I have to say in further support of that motion is—and, incidentally, I believe that the Examiner has granted me a continuing objection to any [717] evidence coming in in these proceedings, or the proceedings continuing without the availability of these records.

Hearing Examiner Feiler: That's right.

Mr. Schuchert: I would like to point out to the Examiner that I think it has become apparent now, when he analyzes, reviews the documentary evidence that has been put into evidence through, particularly, witnesses such as Mr. Caputo, that I have been very much prevented from doing a proper cross-examination of this witness. Because there have been sales testified to supposedly that were made through Strathmore Securities, and from the records I have access to, as far as I know now, I would have no way of checking or ascertaining the nature, times, and circumstances of these sales.

Now this is merely one example of the effect of the failure to turn over these records has had on our ability to defend in these proceedings.

I have cited in my brief—I didn't attempt to become too elaborate; I cited a case which I thought was very much in point, and that is the application of Bendix Aviation Corporation. I have one other citation which I would like to put on the record, and that is *Chapman v. Goodman,* Circuit Court of California, 219 Fed.2d 802. In that case the Court held that books, papers or other documents produced pursuant to subpena duces tecum remained the sole property of the [718] person who produced them, and they could not be kept away from that person by clerks, administrative officers, or others who participated in the proceedings.

So that it is our position that we are being denied due process by being forced to defend in these proceedings without having returned to us the books and records which the Securities Commission had agreed to return many months ago.

Mr. Schief: Mr. Examiner, at the outset it would appear to me that the issues here should be stated from a reading of the motion by Mr. Schuchert's clients for the return of the books and records and to suppress evidence and for postponement of the proceedings. It appears that he raises no question of privilege being attached to these corporate books and records; obviously because these are corporate books and records which were turned over to him and not any personal records of his client, and also because these books and records are required to be kept pursuant to the provisions of Section 17 of the Securities Exchange Act of 1934.

So that the issue here seems to me to resolve itself to one of whether or not Strathmore Securities is entitled to exclusive possession of its books and records while a private investigation of the Commission is going on merely for the purposes of preparing its defense in an [719] administrative proceedings.

Now there has, I don't think, been any showing here that Mr. Schuchert's clients have been prejudiced in any way in the preparation of their defense. Now just a minute ago Mr. Schuchert stated

to you that it must be obvious to you that he has been unable to conduct an appropriate cross-examination in view of his non-access to any records that he might need. He has had access to these records ever since he went to Washington on January 12. We have been willing to bring these records, at moment's notice, to Pittsburgh so he could review them and prepare for his defense.

Those books and records have been here all this week for him to utilize. And I will say—I am sure I can say, and I'm sure without contradiction, that neither Mr. Schuchert nor any person associated with him have taken advantage of the information in those books and records.

But beyond that I think up until—or all though this week's proceedings it has been obvious to you that none of the records that we have offered into evidence so far have been books and records of Strathmore Securities. We have been offering many records with respect to the two trustee accounts, the records of Merrill Lynch, but nothing yet from Strathmore Securities. There have only been a few areas of testimony which have even hit upon sales through Strathmore Securities as of now. And I do submit that if Mr. Schuchert [720] really wants to check out those few transactions in any way that he needed to on the books and records, he could have asked your Honor for whatever recess it was necessary to take to walk over across this room and take the books into the other room, if he so desired, and spend whatever time was necessary to review those transactions. He didn't do it, and it is apparent he didn't do it because it wasn't necessary to do it.

Now as to the law, I haven't even read the case that he has just cited. But on a mere listening to how he recited the facts of the case, saying that the books and records, as held by the Court in that case, are the sole property of the person who turned them over, and that the Clerk of the Court, or people in that category, have no right to keep them away from the owner, that is a long way from the case at bar.

We have a situation where these records initially were turned over voluntarily by Mr. Schuchert's representatives upon agreement with members of the Staff. And we have gone through the long history of how we have made the books and records available, and so forth. But at the present time these books and records are under subpena to be produced here in this hearing for purposes of this administrative proceeding; and, at the same time, these books and records were produced initially during the course of a formal [721] investigation that the Commission was conducting into possible violations of the Federal securities laws.

Now I don't need to tell your Honor that the scope of the normal Commission's investigation doesn't necessarily have to stop with the beginning of an administrative proceedings. The Commission has a mandate to see whether or not there have been any violations which may be of a criminal nature, or any violations which may be of such a current nature that there may be a necessity to go into the District Court and ask for an injunction. And under those circumstances the staff has been reviewing the books and records of Strathmore Securities.

During one phase of the investigation, around March of 1964, it has come to my attention that Mr Brown, who is here in the courtroom today, had a conversation with Mr. Schuchart. And this was shortly after the death of Mr. Klein, the former partner of Strathmore Securities. And during the conversation the books and records, the question of the books and records arose. And it has come to my attention that at that time Mr. Schuchert, even though the expiration of the thirty days had long passed, Mr. Schuchert said "We have just had this death of Mr. Klein. We are in no hurry for the books and records at this time. We will make other arrangements."

So when Mr. Schuchert talks about the agreement [722] that we had to turn them over after thirty days, and how can a government agency, who is supposed to stand for everything that is right

and just, not fulfill its agreement, I think he is forgetting these little oral agreements that were made over the telephone from time to time and, especially, the one I have just noted.

But beyond that I think that the question of unlimited and exclusive access and control of these books and records, which I think they are asking for, is unreasonable in view of the present Commission order to investigate possible violations.

And I think the Sutro case envisioned that, even with the advent of an administrative proceeding, there can be further investigation. And the Sutro case is a Southern District of New York case. I don't have the citation; I'm sorry.

And I would just like to point out that I think the law is clear that the Commission's power to investigate is analogous to the power of a grand jury. And, as you know, and I am sure Mr. Schuchert knows, many grand juries sit for as long as eighteen months investigating cases. And the reason I bring that up is this: that I think it is clear from the cases that when an investigation is doing on a government regulatory body, if it is conducting a formal investigation, can take possession of corporation books and [723] records that are required to be kept by law, and examine those books and records for a reasonable period of time.

I think this is clearly held in *Bornn v. Page,* 14 Fed.Sup. 764. It is a 1936 case in the Eastern District of New York. And that case I think was very, very similar to the one that we have here. It was a motion to enjoin the deputy collector of Internal Revenue from interfering with the taxpayer's possession of his own books and records. What had happened was that the Internal Revenue had brought suit and made some charges against this taxpayer, and they issued a summons for his books and records. And he made the same argument that Mr. Schuchert is making now, that this summons and the production of the books and records would hinder his preparation of his defense of the charges. The Court in that case held that cer-

tainly the plaintiff would be entitled to the return of his records after a reasonable period of time; and in that case it was twelve weeks. But the Court went to great lengths to point out that the reasonableness of the time would depend on many factors. Included among those factors are the scope of the particular investigation, and the nature of the investigation, and the range of the government's enquiry. And in that case, as well as in our instance the government offered to make the records available to the taxpayer at his convenience, and as we have done in this case.

[724] So it seems clear to me that the only question here is whether or not what we have done has been reasonable under the circumstances. And I submit it certainly has been reasonable. And I think you will agree, after listening to what has been put into evidence so far about the scope of the operation, of the sale of all of these shares that came down from Popell through Perma Cement, and distributed out to the investors through a number of different sources–Strathmore Securities, other brokerage houses, and the trustee accounts– And we have only begun to show what amount of stock was distributed. We already know that the Caputo trustee account distributed them; we know that the Schauffler trustee account has distributed stock; and we intend to show that there was a third trustee account that distributed stock, the Christe trustee account.

These points by themselves make it evident that the scope of this investigation was so far-flung, the range of our inquiry was so wide, that it would be impossible to trace the flow of these shares, and trace them properly–properly–without making a diligent and exhaustive examination of the books and records of Strathmore Securities; which I think the evidence will show was an integral part of the distribution of these shares.

So under these circumstances we say, and in view of what we have done to make these records available, we say [725] that we have kept these records for what we feel were reasonable circumstan-

ces in view of the Commission's mandate to investigate; and we feel that there has been no prejudice to these respondents, and that they have made no showing of prejudice in any way, and that they have not been hampered in the preparation of their defense.

Now I think it is almost a cardinal or classic statement to say that Mr. Turner, or someone else who is familiar with the operation of the distribution of the shares, is certainly a lot easier—would be able to, a lot easier, to go to these books and records and trace the flow of the shares than we would be able to, being intimately involved with the distribution.

So just in ending I would like to say that it appears clear that in view of the circumstances of this case the scope of the investigation, the vastness of the facts—the vast amount of facts here it was certainly reasonable for us to keep possession, under the conditions that we kept possession, and now these same books and records are here in this courtroom pursuant to the subpena that was issued for them to be produced at this proceeding.

And I submit to you that Mr. Schuchert's motion for return of the books and records should be denied; that none of the later evidence that will later come from these books and records should be suppressed, and that there should [726] be no postponement of these proceedings. And again, as I mentioned on Monday, these records are available now for examination by Mr. Schuchert or any of his representatives, and will continue to be. And we have offered, and have already stated that when we have the flow charts prepared we will allow Mr. Schuchert, and not object to any amount of time he needs, to trace from these records what we outline as the flow of the securities on the charts.

Hearing Examiner Feiler: Anything further on this?

Mr. Schuchert: Just a few remarks.

I think Mr. Schief has made out an excellent case as to why we are more entitled to the books and records than we would be

normally. The great scope of this investigation and the myriad transactions that he talks about, which require the Securities and Exchange Commission to have these records certainly applies as far as these respondents are concerned.

Now he has assumed a few things in his argument. That is, he has made out a case so far of intimate involvement by Strathmore Securities in this distribution; which I don't believe has been made out so far as the testimony to date. Be that as it may, I think that his own description of the time required by the Securities and Exchange Commission, with trained investigators, and with sources of fact that are inaccessible to Strathmore Securities,—and I mean the [727] records of other persons and other brokerage houses; if they require those books and records for that period of time isn't it reasonable that in defending this case, and in attempting to find out, under this broad order that we have here, what transactions we might be held accountable for, and what we might not be held accountable for, that we should have access to these books and records?

Now this idea that Mr. Schief propounds, that giving us access now is a fiction. And you, Mr. Examiner know it's a fiction. You've been here all week and you've seen the number of hours that this investigation has gone on. I don't know when we are to send in personnel from Strathmore Securities, while this hearing is in progress, and, with them, attempting to ascertain facts from these books and records.

I suppose Mr Schief's alternative would be that each time a question comes up we adjourn the proceedings and recess until we are satisfied on some particular point.

But I submit it is not possible to operate on that basis. It is not possible, merely when a question comes up, to run to the records and find out on the spot whether it is right or whether it is wrong. Certainly with all the forces of the government, with all the

time, with all the people they have involved, and their access to information, they obviously weren't able to do this, to make spot checks in these records. We are being put under the position, or under the [728] burden of defending these proceedings and, at the same time, doing the investigation work which is necessary to support our defense. And I think this is highly improper and denies us due process.

Now Mr. Schief says: Well at any rate they are here under subpena right now. I haven't researched this point, but I doubt very much the effectiveness of a subpena addressed to Strathmore Securities to produce books and records which are no longer in Strathmore Securities' possession but which were, at the time their subpena was issued, in the possession of the Securities and Exchange Commission.

I say I haven't looked into this question, but it would seem to me such a subpena would not be effective.

Now Mr. Schief has cited some law, namely the Sutro Brothers case in the Southern District of New York, which does not bear on the right to records whatsoever. The Sutro Bros. case—the issue is not even raised as to the right to books and records in the Sutro Bros. case. I am familiar with it.

The other case which he cites, *Bornn v. Page,* was a proceedings by the Internal Revenue Services I am not familiar with the facts and circumstances. I do know there, as Mr. Schief stated, that a reasonable period of time was considered twelve weeks in that case. And I don't believe [729] in that case, although I am not sure, that there were proceedings that then had to be defended at the time of hearing. In other words, this was an action to enjoin the continued use of these books and records in the interference for the preparation of defense; but I doubt that the defendant in those proceedings was then facing an immediate hearing for which he needed these books immediately.

Now the case of the application of Bendix Aviation Corporation are not the facts which Mr. Schief recited to you as being how I stated them. They are not the facts at all.

In the Bendix Aviation case the books were subpenaed for a grand jury proceedings. They were retained by the grand jury during the course of those proceedings. The grand jury proceedings terminated and the government attempted to continue possession of those books and records to bring and enforce another action and to implement further investigation against the defendant. The Court in that case held (a) the books and records were the absolute property of the person that produced them; but, most important, the Court held this: even during the grand jury proceedings the corporation would have been entitled to possession of the books and records at the end of each session. They would be entitled to bring a messenger in and take them back.

Now that case I think is decisive on the question [730] that is now before us. There was no doubt in that case that the Court's statement that the corporation was entitled to repossession of its books and records after each particular session; and the only exception to that is if a proper order of an appropriate court impounding those records were actually entered.

Now just because the Securities and Exchange Commission has embarked on an investigation, just because they happen to be dealing with registered dealers who are required to keep books under Section 17—it says "for the inspection of the Securities and Exchange Commission": it doesn't give the Commission the right, because a broker in attempting to cooperate turns over the books and records, to then not return them.

Now Mr. Schief brings up a conversation I had with Mr Brown over the telephone. I had that conversation. It was very shortly after the president of this firm died very suddenly, and I certainly felt that I wasn't waiving any rights by saying at this particular time

"Mr. Brown, we can't use these books and records. As a matter of fact Mr. Klein was the officer of the corporation in charge of the books and records, they were kept under his jurisdiction, supervision and control. If I am to be held to be waiving my rights— And further Mr. Schief says: It was already thirty days after we originally turned the records over. How he can use [731] this point in support of this position is beyond me. It would seem to me that the broker involved, Strathmore Securities, and myself had then gone overboard in cooperating with the Commission and leaving them there for over thirty days. If what Mr. Schief is trying to say is, because at the end of thirty days we didn't make immediate demand we have waived our rights, I think he is on extremely bad ground.

I think there is more of a case to require the Commission to return the books because we did not, at the end of thirty days, demand their immediate return.

Now, Mr. Examiner, I don't know what your ruling will be in this matter. We have asked—we have told the Commission they have had these books and records and they could make copies of every document there and return the originals to us. I don't think there is any just ground in these proceedings at this stage to conclude, or even suspect, or even be concerned with the fact that somebody is going to destroy these records, or that they will be destroyed as evidence, or made unavailable as evidence. If there is, if the Commission has good ground to believe that such a circumstance exists, I am sure an appropriate order in an appropriate forum could be obtained.

To unilaterally decide because they need this in the course now of their preparation of this case, that we should be deprived of them, and continue to go through this [732] hearing with the blanket statement "They are available over there stacked up on a cart in this room: you haven't been prejudiced at all"—I contend that we have.

Thank goodness these records have not been interplayed in these proceedings to the extent that they could have been. I do know

that there were two transactions today where we do not believe Strathmore participated in sales. We don't know this. We have no way of knowing this. Now I might be held to ask you for a recess and to go over, or bring someone in familiar with these books and records and, during a recess, ascertain whether or not that is a fact, and then come back and conduct my cross-examination. I feel that I would be unduly greatly hampered and prejudiced if I had to present a defense in that manner.

Now we again submit to the Commission—expense seems to be no problem with respect to other matters—I don't know why they can't make copies of these and return the originals to us; or make copies for us and keep the originals. But I contend that I will not agree that it makes a fair arrangement for us to properly defend ourselves in this proceeding to just say to us that these books and records are available in this courthouse and that, presumably either during recesses or after hours, you can have access to them.

Irrespective of your ruling I would request that, [733] in the event that you deny my motion, that you certify same to the commission.

Mr. Schief: Just one other thing: I think on the question of cost, I think a conservative estimate would be that it would cost close to $5000 to photocopy all the books and records that we have.

Hearing Examiner Feiler: Well I will get to that in a minute.

The thing that bothers me about one aspect of this motion is my power to rule on whether or not these books and records should be returned to Strathmore Securities. They were taken under an administrative subpena that I didn't sign and I haven't seen, presumably issued by the Regional Office under delegation from the Commission. And I have been designated to hear the issues raised in the order for the proceedings. But I doubt very much that I have power to rule on the validity of an administrative action with which I had no connection at all.

Now I think if it is sought to pursue this matter further perhaps the best way would be to send these motion papers on to the Commission, and I could return them to counsel, with perhaps a covering letter pointing out that you are still pressing this motion and referring the Commission to the pages of the transcript on the first day and this day, which will embody what was done and said, so that it isn't a waste and there would be no need to [734] repeat anything that you want.

You could perhaps, if you wanted to supplement it, you certainly could. But that would be my comment on the question of the raw question of the demand to turn over the books and records as such.

Now I want to go further, and we can discuss this as we go along. But I do have an obligation to see that a fair hearing is conducted in accordance with the requirements of due process, and that embodies a fair opportunity of all the respondents to muster and present evidence that they feel is relevant and material.

Now on that score I am wondering whether the argument for return becomes academic because if the records were to be returned, and I were requested and I did issue a subpena for the production of the books and records for the purpose of presenting evidence in this proceedings, they would still go back on the same track that they are now, I assume, except under the technical control of the respondent Strathmore; which could again, if they put them on a moveable trolly, take them out each evening and bring them back in the morning. I don't think that changes the picture too much. But I am interested that there be reasonable access to them as needed, both when we are in recess and when we are in hearing. And I am very much interested in the suggestion that Mr. Schuchert just made [735] a while ago about photostats.

Now I know there is a whole large trolley full of records, but I also am very sure that the Division doesn't intend to introduce

each and every one of those papers that are on that trolley. Now there are certain things that are obviously important, and that is the account of Strathmore in these securities, and perhaps the accounts of some individuals. I mean I can say that without knowledge of the details. Can't that be photostated and handed over? Isn't that the basic material here?

Mr. Schief: Well there is one charge I think that I would like to ask you to pay special attention to, and that is the failure to record certain transactions on its books and records.

Now we are going to be forced to put in most of the blotters, the four blotters of Strathmore, to show that certain of these transactions which we feel should have been recorded on the books and records of Strathmore Securities do not appear on the books and records of Strathmore Securities.

Now it would be possible, but I don't think practical for us to pull numerous and numerous pages out of a blotter to show that the transactions were not reflected on that particular date.

As to the other books and records, I believe that [736] there could be photocopies made in spite of the cost.

Hearing Examiner Feiler: Well I don't want to inflict a $5000 cost on you. But I don't see how a photostat of the account in one particular stock is going to run up any $5000 bill. If it runs a $10 bill it would be a lot.

Mr. Schief: Well, I guess you're talking only about the stock position records, which is just one of the many records that we have here.

Hearing Examiner Feiler: Well I think if you gave the respondents here a copy of the records showing their activity in the Popell stock which they kept, that at least would be a starter. And if there are any particular accounts that you are going to dwell on in detail—maybe the Caputo account; I don't know—if you photostated those you're still not going to run up a big bill, are you?

Mr. Schief: We only got photostats of those to begin with. They have the originals for those account cards, I can assure you. We don't have those.

Hearing Examiner Feiler: Well let me say this: I don't think you have to photostat four volumes of blotters to get the registrant here to agree that certain transactions don't appear on the blotters.

Mr. Schuchert: No, sir.

Hearing Examiner Feiler: I think if you gave [737] Mr. Schuchert a list saying "We want you to stipulate that these transactions don't appear on your blotter," without waiving your other objections, I've got a feeling he would agree to it.

Mr. Schuchert: There would be no problem.

Hearing Examiner Feiler: Of course he would argue that they needn't appear there, or some other reason, perhaps, I don't know. But I don't think you need to photostat the four volumes.

And I would say this: you people could confer on this off the record, as far as I am concerned. Maybe you could make an agreement, for exchange of books and photostat certain key records. And you would whittle this problem down.

Mr. Brown (Administrator of the Commission's Washington Regional Office): May we have a few minutes, Mr. Examiner?

Hearing Examiner Feiler: Yes. Let's take five minutes, and you people talk among yourselves and then across the table.

Mr. Brown: Before we take the five minutes I'd like to say something to Mr. Schief and then come right back, if you don't mind.

(Discussion off the record)

Mr. Brown: Mr. Examiner, what I would like to do is to ask that your decision on this be deferred until, say, [738] Monday afternoon, to give us an opportunity to talk with the Division to see what the situation is with respect to the availability of funds to photostat these documents, and to also confer with Mr. Schuchert and other counsel on this.

Hearing Examiner Feiler: If he is agreeable it's all right with me.

Mr Schuchert: Well I am agreeable to this extent, Mr. Examiner: If we can work out an arrangement– pending, of course the determination of the availability of funds–that all of the exhibits or documents, the books which would be used as exhibits by the Division, that we would have copies of those in advance, I think this problem can be resolved.

Hearing Examiner Feiler: Well I have got a feeling that we're not talking about a tremendous availability of funds, Mr. Brown. Don't put that on me. I'm not asking you to spend $5000.

Mr. Brown. I know that. And I'm not even asking anybody else to spend $5000. But what I would like to do is to explore this matter with the Division and see what can be worked out; because we certainly have no intention of sitting here with these books and not giving the respondents an opportunity to examine them to the extent that they need to examine them to prepare their defense. All I am asking [739] for is a little more time to see if we can't work something out.

Hearing Examiner Feiler: All right. Why don't you give that consideration; and, if Mr. Schuchert doesn't object–and I don't think he does–I will defer. But only until Monday. Let's settle this and get a firm position or agreement sometime on Monday.

Mr. Brown: The reason that I ask for Monday afternoon is so that I can get a chance to work on it Monday morning. And I'll see if I can do something about it over the week-end.

Hearing Examiner Feiler: And I think if you gentlemen, on the part of the Division, think over carefully what books and records you need in the form or positive evidence rather than negative, if something doesn't appear there, your expense will go right down.

Mr. Schuchert: Well just so, Mr. Examiner, that it is in sufficient time so that we have copies of these during appropriate cross-

examination of parties who would be testifying on matters germane to these records.

Hearing Examiner Feiler: I would agree that, regardless of deferring on this main motion until Monday afternoon, if in the course of any examination on Monday there is need to look at the books, either for a short time or a longer time, I will grant it: no problem on that. [740] Let's try to work that out.

And maybe if some of those books—not the very bulky ones—could be taken back to Washington you could photostat them at no cost, really. I actually think the bulk of this—if you would photostat the key accounts that you are interested in, if you could take those books back with you you could bring photostats back on Monday and it would be all right. The trading account is the main thing, and maybe a few of the key customers. I can't see what else you would be interested in.

Mr. Schuchert: Anything that they would propose to introduce in these proceedings.

Mr. Brown: Well why don't you let me talk with you, possibly Monday morning. I will go to work on it with Mr. Schief, and we will get some word to you by Monday afternoon.

Hearing Examiner Feiler: All right. This all seems to be agreeable, then. So suppose we go over until Monday.

* * *

[1081]

Proceedings on February 9, 1965

Mr. Schief: Yes, Mr. Examiner.

I have been advised that our office has contacted the budget people of the Commission, and there are certain restrictions on how much money can be spent on the photocopying of documents of this sort. What they will do is make an attempt to begin the photocopying of these documents so that the photocopies can be returned to Mr. Schuchert. And we will do this preferably on a piecemeal basis; because they have to be transported back to Washington.

Now that causes a fundamental problem: If we are transporting documents back to Washington to photocopy them, how can they be used here in the course of the hearing if there is any need for them?

Under those circumstances what the Division has suggested is that Mr. Schuchert be given those photocopies as they go back, possibly during the week. We're in recess after this week. If you happen to go back to the New York trial and we are in recess, possibly they can be photocopied during that week. If they are needed before then by Mr. Schuchert, the Division suggests that they be examined either in this room or for whatever period of time he needs, or in the adjoining room for whatever period of [1082] time he needs. Even if he needs a day, we have to adjourn the hearing for a day, or two days, to allow him and his representatives to make whatever examination he feels is necessary, prior to our being able to physically deliver part of the books and records to Washington for photocopying.

Now the reason why they have to be delivered to Washington is that we understand from the budget people that they, in their own duplicating shop, can have these records duplicated for 8 cents a page. Now I don't believe that that is even an accurate statement. I think that what they are referring to is legal sized paper. I don't really believe that they understand that these blotters are probably 24 inches by 24 inches.

Now Mr. Schauffler had a photocopying job done on one of the trustee account books, I think, and certain checks, and it cost over $125, here at the Pitt Litho Service. Now that gives you an idea of the cost involved when you take a look at these four blotters on this cart that are already in evidence.

Now that is the reason why the Division and the budget people are having so many problems.

They are going to make an effort to photocopy the ones they can, and the ones we feel we will have to keep. If we can't photo-

copy them all we will make some arrangements to return either the originals or the photocopies.

[1083] Hearing Examiner Feiler: My only point at this phase is to try to work out something by way of mutual accommodation that is fair.

I think a first step would be for counsel to go over these records jointly and try to agree—or at least have the Respondent designate what records it wants.

Now I still say that I doubt there is going to be any request for those four large volumes of blotters. I may be wrong. There may be a page needed out of there occasionally; but I could be dead wrong, if that is going to be required.

Once I think you have counsel designate what he would want, then I also think the Division in fairness should indicate what records it might use directly here so that he can whittle his request down. Then you know what you have to deal with.

And I certainly would say from the standpoint of photocopying them, maybe what we ought to do, regardless of my commitments next week,—and Mr. Helwig has indicated off-the-record that he has other engagements the first three days of next week, too; I would say that the fair thing to do is counsel should meet at some convenient time, maybe an extra hour one of these days, and let's get rid of the witnesses on the stand, and perhaps just these two others who are waiting in the wings, with one man to complete [1084] his testimony, and maybe Mr. Vogel, and hold off really calling others, so that these materials could be photostated as soon as possible and turned over to other counsel.

Mr. Schuchert: Mr. Examiner, that is agreeable in general. If we would be in recess next week I could provide the Division by the end of this week with a list of those materials that we would like copies of.

Now I believe the work would be lessened, as you suggest, if the government would indicate which of these records they intend

to introduce in evidence. Unless they frankly want to take some advantage of surprises—which should not be the intent or the purpose of this type of proceeding—they would be in a position to advise me as to which of these records, of the books and records of Strathmore they intend to use in these proceedings. And during the next week if copies of those could be prepared and be available back here in Pittsburgh by the following Monday, it would be very advantageous.

Now what I want to avoid is this: a piecemeal reproduction of these records as we go through this trial, so that I am in a position of only getting them immediately before an issue is raised with respect to them.

Hearing Examiner Feiler: No. My present intent is, other than finishing these people who are still waiting in the wings, as I've put it, my present intent would be not [1085] to go ahead until this matter is reasonably satisfactorily cleared up.

Mr. Schief: I think there is no intention even to offer any evidence before next week, if we convene next week, where it would be necessary for Mr. Schuchert to have to review the books and records.

Now you will recall already on one occasion this morning during the course of the questioning of a witness he asked that we provide him the information; otherwise he would have to go to the books and records. We had the information readily available and we gave him that information. And we would be willing to do that again if the time arises during this week, or before he gets any books or copies of books and records.

Now I want it made clear that we will be glad to do what Mr. Schuchert has suggested, and point out which records we intend to use in these proceedings, and make photocopies of those records and return them. Now beyond that we intend to keep the records under the subpena, I mean under the investigative phase of this case. And I think he understands that.

* * *

[1088] Secondly, in the course of these proceedings we have had share certificates and share certificate numbers which have been issued to the former stockholders of Perma Cement Products. I have been interested to know what the subsequent distribution of those shares was, for various purposes. I have been unable to do that.

So we have been encumbered, substantially, in these proceedings, not being fully advised of all the facts that we might better present our defense. So that any agreement we work out—As Mr. Schief has stated, they intend to keep the records. I am not stating that because I make some agreement with the government that I won't pursue remedies elsewhere to get these books and records back.

Hearing Examiner Feiler: Well there is no waiver. I have said that before, and I will repeat it.

But I think this, too: that if counsel exercises their ingenuity they can cut this down very substantially. For instance, I would assume that the Division, instead of working with mountainous blotters there, would probably prepare a schedule from the blotters, some exhibit of what they are relying on. And then, if they furnished that to other counsel to spotcheck it, or do whatever they want, I don't see why a schedule can't come in in lieu of trying [1089] to juggle these bulky volumes.

Mr. Schief: We intend to do that, Mr. Examiner. And under those circumstances I think the normal practice would not be to offer the underlying books and records, but at least have them in the courtroom for purposes of cross-examination and checking the accuracy of our schedules.

Mr. Schuchert: That's correct.

Mr. Schief: We don't have much of a problem with that.

Hearing Examiner Feiler: Well that takes care of the bulk of the material I see on that truck.

Mr. Helwig: May I ask, for a point of information: I thought I understood Mr. Schief to say that these blotters are already in evidence in this proceeding.

Hearing Examiner Feiler: No.

Mr Schief: No. I said they are marked for identification.

Mr. Helwig: I see.

Mr. Stewart: I think Mr. Schief did say they were in evidence, but it was a misstatement.

Mr Schief: Yes, I'm sorry.

Mr Schuchert: Let me ask you, Mr. Schief, on the record, do you have these schedules and charts prepared yet in connection with the flow of the securities?

Mr. Schief: One chart, Mr. Brown informs me, he [1090] received today from the printer. We hope to have it, copies of it, late this week. Maybe by Thursday or Friday. And if we do we will try to review it—I haven't seen whether or not the printer has made any inaccuracies in transcribing the statements on it.

Hearing Examiner Feiler: I would say, just to sort of close this matter, that the sooner counsel can get together on this the better. Try to whittle down the materials that need to be duplicated and see if you can substitute schedules that just need, perhaps, spot checking or rechecking against original records. And I do think that will cut this duplicating problem down a great deal.

But, of course, the sooner it is done, the better, since apparently there obviously has to be a lot of calling back to Washington. I do want other counsel to get that material as soon as possible. So let's put that down for some time next week, probably the first three days, again, regardless of other counsel's commitments.

Mr. Schuchert: We can get together before this week is out and agree upon what material will be duplicated. So they will have a full week then.

Hearing Examiner Feiler: I think from this point on we better let counsel discuss it off the record and make their arrangements. Just let me know if there are [1091] any special problems that come up.

* * *

[1402]

Proceedings on February 12, 1965

Hearing Examiner Feiler

Now before other counsel go off, we do have this question remaining before we go on with witnesses. Counsel are supposed to get together and agree on some records that will be photostated.

I will say also as far as next week's sessions Mr. Helwig previously applied for our not meeting the first three days of next week because he has other commitments. He has now cut that down to two days and I would agree that in view of the fact that some time would be needed to photostat the material anyway that we can grant that request and accordingly when we resume it will be on Wednesday at 10 a.m.

Mr. Schuchert: We are to have no witnesses this afternoon?

Hearing Examiner Feiler: I'm just coming to that now.

Let's see Mr. Schief, you'll need some time to get together with other counsel on the photostating matter.

* * *

[1569]

Proceedings on February 17, 1965

Mr. Schuchert: For the record I would like to inquire what progress we made with respect to those summaries that we agreed upon Friday.

Mr. Schief: We brought with us the account cards that we will just mark before we turn them over to Mr. Schuchert. Probably the first thing. We have yet to photocopy the other schedules he wants which shows Mr. MacMillian's analysis of certain transfer records and certain books and records of Strathmore.

Mr. Schuchert agreed on Friday that he would be willing to accept these schedules and analyses in lieu of copies being made.

Mr. Schuchert: Subject to spot checking of course to determine their accuracy.

* * *

[2779]

Proceedings on March 25, 1965

Hearing Examiner Feiler: Is there anything further? If not, we will stand in recess until tomorrow morning at ten o'clock.

Mr. Schief: I am sorry. We do have one thing further.

We want to turn over to Mr. Schuchert just one chart.

Hearing Examiner Feiler: Of the record.

(Discussion off the record)

Mr. Schief: We only have one that is completed, Mr. Examiner. I will not have it marked at this time, but this is a chart representing the flow of ten thousand shares of L. F. Popell Company, Inc., stock that was issued to Perma Cement Products of America on November 15, 1960. Maybe I better have it marked as the next exhibit.

Hearing Examiner Feiler: Division's Exhibit No. 303.

(Whereupon, Division's Exhibit No. 303 was marked for identification.)

Hearing Examiner Feiler: I assume counsel studied [2780] this with interest.

What I would like to know, what I would like you people to do on charts such as this, is to be prepared eventually to let me know whether there is agreement on what the chart shows, or if there is disagreement, and on what points there is disagreement.

Mr. Schief: This is the very reason, Mr. Examiner, that we are giving this chart to Mr. Schuchert, so far in advance of the time that we intend to use it in evidence, so as to give him such time to check it, check the accuracy of our chart, to be able to make whatever objection he has to whatever tracing he wants to do.

Mr. Schuchert: I think we will be able to do that, Mr. Examiner.

Hearing Examiner Feiler: I certainly do not require any response at this time.

Mr. Schuchert: Mr Schief and I have had arguments on charts before this and I would like to have a little more opportunity to look it over.

* * *

[3768]

Proceedings on April 30, 1965

Hearing Examiner Feiler: On the record.

Is there anything further today that the Division has?

Mr. Schief: No, sir, we don't have anything further.

We would spend some time, if Mr. Schuchert has the time this afternoon, to do a little bit more on the charts as we did early this morning. It is up to him.

Hearing Examiner Feiler: Well that is up to you people to do it off-the-record. But I will say this, as I have said before: I expect you people to use the interval fruitfully, to make sure that when we go ahead next Thursday that we can definitely finish at least this segment of the case by Friday without risking a spillover.

If it occurs to any counsel that there is a real risk that we won't do it, please let me know; because as far as I am concerned we could meet Wednesday.

All right. So if there is nothing further—and I don't hear it—we will be in recess until next Thursday, May 6th, and we will meet in this room to go ahead at that time with further examination of Mr. MacMillan, [3769] and then anything else the Commission has to offer, except for this matter of Neafsey to which reference has been made.

Mr. Schuchert: Just one moment, Mr. Examiner. I may have a statement to make.

Mr. Examiner, I have been considering this problem of these charts which have been marked as Division Exhibits 303, 327 and 374, and I think in light of the previous ruling the Examiner made with respect to what we have been calling argumentative evidence,

and with respect to the Examiner's remarks concerning my objection to the configuration of these charts and that I could submit a chart with a different configuration, I don't see that there is any need or any purpose to be served in me further reviewing the details concerning these charts with Mr. Schief.

Obviously they are going into evidence. And the attack that I would make upon them will certainly not be based upon any typographical errors which we may find, which can be corrected at any time, whether admitted or not, but would be based solely on configuration.

I don't therefore, knowing in advance that these are going into evidence as exhibits—I think it would not only waste time but would be somewhat prejudicial for me to sit down with Mr. Schief and take a position which I might want to argue later.

[3770] For that reason I would suggest that if the Division feels that Mr. MacMillan has testified adequately enough concerning the method of preparation, the information from which these charts were obtained, they can offer them in evidence and the Examiner can make a ruling on them.

Mr. Weil: If I may be heard with respect to that. I had assumed we would defer this ruling to next Thursday, and I prefer we adhere to that. I don't think the Division can be prejudiced by offering them Thursday morning rather than this afternoon.

Mr. Schuchert: I'm not suggesting this afternoon, but I am suggesting that I don't see there is any purpose to be served, in light of what has occurred here, in my sitting down and attempting to either dispute or not dispute the arrangement and configuration of this chart. With respect to any typographical errors that are involved, if I discover them they will be brought out either in my cross-examination of Mr. MacMillan or otherwise. And I don't see why—I'm not consenting to them going in; in fact I'm objecting on the basis of configuration alone. But I think it would be truly a waste of time and I think it would be very prejudicial to my own case.

Hearing Examiner Feiler: Well my only approach to that, from the standpoint of trying to save time, is [3771] this: that Mr. MacMillan got on the stand and said, in effect, that the books and records of Strathmore Securities show that certain transactions took place as are indicated on the charts. Now there are two questions when he testifies as to that: (1) is he accurate on what the documentary evidence shows, and (2)—and an entirely separate thing—legal arguments on what conclusions could or should be drawn therefrom; which is an entirely separate subject.

Now my idea in seeing what could be done is to see whether or not there is any argument on the first part of his testimony, which was that the books and records show that transactions took place as indicated on the charts, and I thought—and I thought we arranged for this—that all books and records, and Mr. MacMillan, would be available for off-the-record discussion to indicate what he looked at and how he arrived at placing certain items he did on the charts, so that we can at least get by the first problem as to whether or not he put accurate information on the charts, to find out in what respect there was agreement or disagreement with what he put on the chart.

On the other hand, I am not forcing counsel to do it if he feels he would like to approach it another way, as long as you don't waste time.

[3772] Mr. Schuchert: I don't think it would take any more time, Mr. Examiner.

Hearing Examiner Feiler: Well it's all right with me.

Mr. Schuchert: The main purpose of my sitting down with Mr. Schief and going over these matters would be to urge upon the Examiner the fact that these things are not admitted largely because of configuration. And I don't mean to anticipate you but I am fairly clear in reading your opinion on this that they will go in as documentary evidence, and I have the right to submit documentary evidence on the other side. Under those circumstances I don't see that

anything is to be gained, because Mr. MacMillan has already testified that these accurately reflect the records of both Strathmore Securities and the various trustee accounts and so forth.

Hearing Examiner Feiler: Well that's what I thought, if you wanted to check them you could.

Well anyway I think we have discussed it out. And all I can say is that I expect the Division to be available any time next week, to have a representative here to make records available at the request of any counsel, and to have someone here—I would think Mr. MacMillan—who could explain entries if they are asked about them. And then the opportunity is open to any of the respondents [3773] on any of the first few days of next week to do whatever checking they want. And then we will come in Thursday morning presumably prepared to go ahead with Mr. MacMillan and any other witnesses the Division might have. And everybody here, so far, has estimated that the two days—Thursday and Friday—should allow sufficient time to do that.

Is that right?

Mr. Schuchert: Do we only have Mr. MacMillan? I think that will allow ample time.

Hearing Examiner Feiler: You don't anticipate any witness besides Mr. MacMillan?

Mr. Schief: Mr. MacMillan is the only witness we plan to call next week.

Hearing Examiner Feiler: Well everyone agrees there is ample time. So we will go ahead on that basis. And we might even include Mr. Neafsey's testimony if he shows up.

All right, then. There being nothing further at this time we will stand in recess until—let's make that, as we did this time—10:30 next Thursday morning.

* * *

[3776]

Proceedings on May 6, 1965

Hearing Examiner Feiler: On the record. Let the record show that it is a little after eleven. We have been in recess while counsel have been conferring on the charts which were discussed at our last session.

Whereupon,

LAWRENCE K. MacMILLAN

was recalled as a witness on behalf of the Commission, and having previously been duly sworn, was examined, and testified as follows:

Hearing Examiner Feiler: We now have Mr. MacMillan back on the stand. The Division may proceed as it sees fit.

Mr. Stewart: Mr. Examiner, since Mr. MacMillan testified on the last day that we had hearing on, counsel for the Division and Mr. Schuchert and Mr. Weil have entered into a stipulation with respect to certain of the charts which have been marked for identification.

* * *

[3826] Hearing Examiner Feiler: My basic approach on this thing—and the reason why we are here today—I told all counsel to get together in the recess that I called, to check the entries that were made on those charts against any books and records of the registrant, or anything else here that counsel wished to consult on and try to agree on; also, what they couldn't agree on. That's why we are here now. Also, to take any supplemental evidence that is necessary.

Now, I can't review the whole record that we prepared to date, but basically, I am getting from Mr. Schuchert—and I understand counsel is in agreement—that except where there has been specific mention—like in that Neafsey business on one of the charts, he isn't challenging the accuracy of entries within a particular block. He has been staying within a particular box all the time. It is up to the Division to attach its own significance to it. As I get it—and again outside that reservation where it says, "sold by Strathmore"—gen-

erally, when the box says sold by "X" to "Y" in a particular numbered certificate, there has been no challenge. Is that right.

Mr. Schuchert: That's correct.

[3827] Hearing Examiner Feiler: I'm not trying to put words in your mouths, but basically, the Division may take the position that a certificate number in the possession of "X" went to "Y" and they may then say, we want a finding that there was a flow of this stock from "X" to "Y".

Now, respondents, if they think it is material, might in their turn argue, you can't say that that supports an actual flow, for different reasons, some of which were stated today. Now, if you think that isn't buttoned down the way you like to see it, I suggest counsel go off the record and discuss this some more among themselves, to see if they could arrive at any further stipulations.

Basically, I think that is the only stipulation we really arrived at today, with any of these exhibits. Is that right?

Mr. Schuchert: Yes. Basically, our theory is different.

Mr. Schief: I am not arguing about the stipulation. I am arguing about how these are coming into evidence.

Hearing Examiner Feiler: Well, they are in, I would say, for a double purpose: to the extent that there has been a stipulation on what they contain—of course, they could be used as a basis for filing, because there has been no argument, and what they show, they show. Actually, the purpose of the stipulation was to avoid bringing in original records [3828] transfer records, ledgers and what-not.

Mr. Schief: This is the whole point. This is why I agree with you that they should come in as a double purpose, where there has been stipulations. They certainly should come in for a substantive purpose.

Hearing Examiner Feiler: That's true.

Mr. Schuchert: Where there has been a stipulation, certainly.

Hearing Examiner Feiler: As to the rest of these exhibits having a dual role—for the rest of it, they are coming in merely to illus-

trate, or trying to summarize the Division's position, which it has been working through this long transcript to arrive at. I think as to that, we must depend on the long colloquies we've had here on the record which have illustrated respective positions. I think, for instance, a lot of the things—the contentions we have been talking about—that Strathmore sold stock, there is no agreement about, so that's a matter, of course, in issue. We had various things specified by counsel as to all these things on that basis are being advanced, really, as contentions of the Division. I do say the Division has to go back to the record and say, our statement is that these stocks were sold with Strathmore and is supported by this, this and this, and you can find it on certain pages, or something like that, or any way in which you wish to present it.

[3829] Mr. Schief: I'm satisfied.

Hearing Examiner Feiler: Is that all right.

Mr. Schuchert: Very good.

Hearing Examiner Feiler: All right. What else does the Division have?

Mr. Schief: Have you admitted Division's Exhibit 303?

Hearing Examiner Feiler: All three charts are in.

* * *

[3835] Hearing Examiner Feiler: I am basing my statements on the claim, that if we went ahead with this witness, it wouldn't take much time—a matter of a couple of days, perhaps. I also went on your statement that you were talking about two weeks—that's all I meant.

Mr. Schuchert: Yes, sir. That's running very close. I think we would be very optimistic. The time I take, to a large extent will be governed by the extent of the cross-examination of the Commission. I know they want to make extensive cross-examination of certain witnesses.

Hearing Examiner Feiler: You could make estimates from them. You know how they have worked out in the past.

Mr. Schuchert: Yes, sir.

Hearing Examiner Feiler: All right. We can belabor this point, but I am willing to go along with Mr. Schuchert to put it down for the 7th. Of course, the obligation is on the Division, in the first instance, to keep me and counsel advised as to the progress of the proceedings. That may affect [3836] the day, also.

Mr. Schuchert: May I say this: Since we are not going to be able to go forward on the week of May 24th, I think the Division will be able to notify all parties concerned and the Hearing Examiner, during that week, about their decision as to whether or not Mr. Neafsey is going to be called at all.

Hearing Examiner Feiler: Another postscript, too, I think: Since we are having such a long interval and we've had some from time to time, as this hearing went along, I would expect counsel to be fully prepared on both sides, to be fully prepared when next we reconvene, to put in the main cases. I want you to all be prepared on that basis.

Mr. Schief: We haven't heard yet from Mr. Weil. Assuming, for example, that the Division goes forth on June 7th, and assuming, again, that we do call Mr. Neafsey and out of Mr. Neafsey's testimony it is necessary to call maybe two to three other people, short witnesses, and it takes up a matter of four days, if Mr. Schuchert went forward immediately and had his two weeks, that would put us almost into the last week of June. Now, can we get an estimate from Mr. Weil about what, if any, time he feels his portion will take?

Mr. Weil: If Mr. Schuchert is finished with his defenses, let's say by June 24th, which is about where your schedule has indicated, I would expect we could finish by the first of July without any trouble.

* * *

[3854]

Proceedings on June 21, 1965

Mr. Stewart [Counsel for the Division]: I may be in a position to rest late this afternoon, depending upon whether or not we decide to put the witnesses under subpoena for tomorrow on the stand. At this time, it looks like we are not going to put him on the stand.

* * *

Hearing Examiner Feiler: All right. Then counsel [3855] is on notice that the initiative will shift to you people this afternoon or sometime tomorrow.

Mr. Schuchert: Mr. Feiler, I expressed this to you and Mr. Stewart, I am not prepared to go forward. I have not had any available day since we last convened here to do any work on this case or talk to any witnesses and my schedule will show and the records will show that I have been involved in litigation continually since the last period of time. I have further reasons why I would like to discuss this off the record after I make a phone call or two here today. But, I think that I may warrant some consideration. As I pointed out, I recognize it is not the Examiner's fault or the staff's fault, but in a proceeding of this nature, where we have been called upon to go day after day after day for so many protracted periods of time, you reach a level of unreasonableness and I think it impinges on due process to the Respondent or his counsel when they are put in a position that they have to go forward where there is substantial contradictory testimony and it prevents proper preparation. I would be happy to discuss it off the record and later today go on the record as to what reasonable arrangements can be made.

Hearing Examiner Feiler: All right. You come back later and give us your ideas on that.

Mr. Schuchert: I am willing to go on the record.

* * *

[3861] Hearing Examiner Feiler: I will summarize an off-the-record discussion we all had with reference to Mr. Schuchert's application for an adjournment.

It now appears that he has rearranged his commitments in Spain for the month of July, which he previously made an application for adjournment. Due to certain family problems and other problems, he is asking for about two weeks.

Mr. Schuchert: That is right. I would like it until about July 6.

Hearing Examiner Feiler: I understand the Division does not oppose that application?

Mr. Stewart: In view of our discussion, we do not.

* * *

[4000]

Proceedings on July 7, 1965

Mr. Stewart: Mr. Examiner, the Division has no more evidence to present.

Hearing Examiner Feiler: Then you rest?

Mr. Stewart: Yes, we do, Mr. Examiner.

Hearing Examiner Feiler: All right. Apparently it is up to you now, Mr. Schuchert.

Mr. Schuchert: Mr. Examiner, the respondents whom I represent in these proceedings, on the advice of counsel, have determined also to rest on the record that has been developed, including the cross examination, of course, of witnesses called by the Division.

We are doing this for the reason—I want this definitely to be part of the record—the reason that we are unable to proceed without substantially impairing the rights of the respondents in their ability to adequately defend themselves, I could summarize it under three headings.

First of all, I have a reasonable cause to know and to believe that the Division or the Securities & Exchange Commission itself is

actively considering and possibly making [4001] actual plans at this time toward the recommendation of criminal proceedings against various persons involved with this L. F. Popell Company and its stock, either in Miami or in Pittsburgh, Pennsylvania, but this conclusion is not based entirely on supposition, but I think is based upon reasonable grounds that I consider the Division's case in these administrative proceedings, at least in part, a fishing expedition by which they, under the guise of a legitimate administrative proceeding, are attempting to develop investigation of their own case and possibly to compel this respondent, Strathmore Securities, and the respondent, Mr. Turner, to divulge what defense he might have and does have in the event criminal proceedings are instituted.

I think it is fundamentally unfair, both as a Constitutional matter, both procedurally and substantially, to invoke a proceeding of an administrative nature requiring a respondent to defend or lose his license forthwith to engage in his business. In other words, which would require him to lose a property right when he must do so under the imminent threat that there is a likelihood of criminal prosecution against which he will have to make a defense, and which could mean his actual liberty.

For these reasons, I think that the manner in which these proceedings were instituted and their purpose or improper end have denied, or an attempt to deny the respondents due [4002] process under the law. I think it is a system which would cause him, maybe, in order to protect his license in the securities business, to forego a possible right he might have against self-incrimination. I realize that respondent has been instructed on these matters in these proceedings.

He has been told that any testimony that would be given may be—any testimony that may be attempted to be elicited may be refused on Constitutional grounds, but I believe definitely that this proceeding is a fishing expedition to force him into a disclosure of his defense.

The second ground is that, under the circumstances considering the scope—the vast scope of this case, the number of witnesses that the Division has called in their own investigation of this case, the multitudinous exhibits which have been put into evidence, the fact that we have tried this case, although there have been several recesses in a relatively—rather relatively short exact period of time, and considering the commitments that I have had and have continuously had during these proceedings as counsel in other proceedings, and the necessity in a case of this type to spend not days, but weeks, in bringing back witnesses whom we have talked to before in preparation of the case, I believe that we have been unfairly prejudiced in not being permitted sufficient time in order to assemble a defense, were we to elect to do so, and this is one of the considerations which [4003] has caused me to make a judgment in favor of resting on the record as it is.

I think the Examiner has been, in his individual rulings, eminently fair and considerate of any requests that have been made, but I don't think even the Examiner has been in a position in the exercise and performance of his duty, under the regulations, to allow sufficient latitude to make a reasonable defense in a case as complex as this.

With all the resources, personnel and money of the Federal Government, it took them, I would say, more than a year of continuous work to prepare their case in chief, and relatively speaking, with a fraction of the personnel and, of course, financially there is no comparison, we have been, since these proceedings were first instituted, given far less opportunity than the Government has.

Now, third, although I have made this a point throughout this record, I know the Examiner has attempted to, in the spirit of moving these proceedings along—has attempted to make available to respondents and their counsel certain information which was in the possession of the Division, and for the record, I will say that one of

the reasons why we are compelled to rest on the record is that we haven't had full freedom with the books and records of Strathmore Securities that would ordinarily be available in a case as complex as this.

[4004] In order to have worked under the conditions, we would have been required to have worked while these proceedings were going on in the Federal Building here, or at some other location in reviewing those records or in making specific requests for specific information of the Division, which they have furnished when it has been made, I think, unfairly restricted and impeded within the time limits we were forced to stay within.

For those reasons, Mr. Examiner, I reluctantly state that we must rest. We are compelled to rest upon the record as it is.

Of course, I reserve every right to argue on any evidence that was adduced both in direct and cross examination in favor of findings for these respondents, but the basic reason, the second two that I gave, the latter two, were more or less ancillary. The principal reason is I feel in part this is a fishing expedition. I think the strategy by the Division has been and was to wait until these proceedings were concluded before definitive motion was taken to bring criminal proceedings, and I think to make a man defend his license in such a proceeding, while at the same time there is a full knowledge that there is a likelihood of criminal prosecution on matters involving the same facts, is unconstitutional to him, both procedurally and substantively.

Therefore, the respondents rest.

* * *

[4006] Mr. Schief: * * * As to the argument that he hasn't had enough opportunity to prepare his case because of the status of the books and records, I submit that at this point it is completely ludicrous to argue that. We have turned over the charts prepared by our own examiners, schedules, documents everything that he asked

for, in an effort to allow him our work product so that he could prepare his case I haven't seen any of the charts that we were told were going to be forthcoming as a result of the documents that we turned over to him, but, most of all, the very day that we began, back on February 1st, we have told the Court and we have told Mr. Schuchert, and we have told Mr. Turner any number of times that those records [4007] up there that were sitting in the courtroom all those days were available to them at any time, and we would make arrangements to put them in the next room for them to review and have whatever suitable arrangements could be made done, but at no time did they avail themselves of this, and that is why I submit that this is the old standby that where you cannot meet the allegations on the merits, you have to shift to some other tactic, and, of course the tactic in this case is, number one, the possibility of criminal prosecution, and then books and records.

* * *

[4642]

[Hearing Examiner's Initial Decision]

A. Turner did not testify in these proceedings. The Division urges that his failure to do so warrants the application of the rule that:

> "The failure of a party to testify in a non-criminal case, in explanation of suspicious facts and circumstances peculiarly within his knowledge fairly warrants the inference that his testimony, if produced, would have been adverse."[12]

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[12] *N. Sims Organ & Co., Inc.*, 40 S.E.C. 573 (1961), aff'd 293 F.2d 78 (C.A. 2d 961), 2 Wigmore, Evidence (1940 ed.) Sec. 289.

[4643] While A. Turner did not testify in his own behalf, he was called as a witness by the Division. He then refused to testify asserting the Fifth Amendment protection. It is urged on his behalf that it

would be improper to apply the *N. Sims Organ* rule in this situation because it would penalize A. Turner for asserting his constitutional rights.

While, in the opinion of the undersigned, the record warrants the findings made herein without application of the *N. Sims Organ* rule, the contention of the Division is valid and the failure of A. Turner to testify on his own behalf on matters where he clearly played a key role furnishes additional support to the contentions of the Division. If A. Turner had not been called to the stand by the Division, the record would have been the same as in the *N. Sims Organ* case. If the Division were to be barred from relying on that case simply because it called a party to the stand who asserted constitutional rights against testifying, then a standard similar to that in a criminal proceeding would have been applied in an administrative proceeding. A Division would be faced with a choice of either avoiding calling a material witness or, if it did, waiving the application of the *N. Sims Organ* rule if there was reliance on constitutional rights by a party called to the stand. There is no requirement that such a choice be made in an administrative proceeding. It must be noted that in the state of this record a party is not being penalized for asserting constitutional rights, but reliance is being placed instead on his failure to present evidence within the scope of the *N. Sims Organ* rule.[13]

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[13]See 8 Wigmore, Evidence (1940 ed.) Sec. 2272, P. 439.

[4644] Counsel for A. Turner stated that he advised his client to assert his constitutional rights, partly because he felt that this proceeding might be preliminary to a criminal proceeding and that therefore the *N. Sims Organ* rule should not be applied here and that there had been a denial of due process. The possibility that a potential witness may be under an apprehension of possible self-incrimination

if he testifies furnishes no valid basis for the Commission to fail to carry out its duty under the Securities Acts to determine in the course of an administrative proceedings whether certain alleged violations of the Acts have been committed. It is required to do so in the discharge of its responsibilities. The requirements of due process prescribe that respondents be given due notice of a proceeding before the Commission and opportunity to present witnesses and other evidence. This right has been afforded the registrant and A. Turner. They are not entitled to further grants. A natural consequence of the recognition of the contention urged by the respondents would be that many administrative hearings would be nullified because of the assertion of some type of privilege from testifying on the part of a potential witness.[14]

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[14] *Security Forecaster Co., Inc.*, 39 S.E.C. 188, 192 (1959).

* * *

[4738]

[Petition for Review of Hearing
Examiner's Initial Decision]

A receipt was executed by L. K. MacMillan, S.E.C. Investigator, Washington Regional Office, dated February 19, 1964, summarizing the records received and containing the following condition:

> [4739] As per agreement between Joseph S. Schuchert, Jr. and Alexander Brown, Regional Administrator, Securities and Exchange Commission, Washington, D.C. all Strathmore Securities, Inc. records are to be returned no later than thirty days from the date of receipt. Strathmore Securities, Inc. has the right to request the immediate return of specific records.

* * *

(Securities Exchange Act Release No. 8207)

SECURITIES AND EXCHANGE COMMISSION
Washington, D. C.
December 13, 1967

In the Matters of

STRATHMORE SECURITIES, INC.
605 Park Building
355 5th Avenue
Pittsburgh, Pennsylvania

AULDUS H. TURNER, JR.
THEODORE B. HENJUM
RONALD D. TURNER
T. THEODORE TURNER

(8-7323)

MICHAEL R. VENTURA
304 Wood Street
Pittsburgh, Pennsylvania

Securities Exchange Act of 1934 -
Sections 15(b) and 15A

FINDINGS AND OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDINGS

Grounds for Revocation of Registration

Grounds for Expulsion from Registered Securities Association

Grounds for Bar, Suspension, or Censure of Individuals

Fraud in Offer and Sale of Securities

Bids and Purchases during Distribution

Offer, Sale and Delivery of Unregistered Securities

Failure to Comply with Records Requirements

Where registered broker-dealer, which was underwriter with respect to offering of securities by issuer pursuant to claimed Regulation A exemption from registration requirements of Securities Act of 1933, participated in transfer of securities to designees of controlling person of issuer at offering price with view to subsequent repurchase and distribution following reported completion of offering and at prices in excess of stated offering price; bid for and purchased such securities during distribution; offered, sold and delivered unregistered securities which had been issued in exchange for corporate assets of and shares of stockholders in other companies; and failed to record certain transactions on its books and records, held,

conduct constituted willful violations of anti-fraud, anti-manipulation, registration, and record-keeping provisions of securities acts, and it is in public interest to revoke broker-dealer's registration, expel it from membership in registered securities association, bar broker-dealer's principal who actively participated in all its violations from association with any broker-dealer, and suspend certain of the salesmen who participated in violations of registration provisions from such association.

Participation by salesman for another broker-dealer firm in distribution of unregistered shares issued in exchange for corporate assets, held, willful violation of registration provisions of Securities Act of 1933 since salesman failed to make adequate inquiries concerning sellers and source of their shares, and it is in public interest to censure him.

Practice and Procedure

Contention by registered broker-dealer and associated persons that they were denied due process because of Commission staff's retention of registrant's books and records which assertedly prevented preparation of adequate defense, rejected, where books and records were made available to them for examination and they had use of charts prepared by staff on basis of such records.

Contention by securities salesman for another broker-dealer that he was prejudiced by refusal to sever proceedings as to him because of substantial evidence adduced on fraud charges against other respondents in which he was not involved, rejected, since proceedings involved common questions of law and fact, hearing examiner was legally trained and judicially oriented, and his findings were reviewed by Commission.

APPEARANCES:

Alexander J. Brown, Jr., William R. Schief, and Michael J. Stewart of the Washington Regional Office of the Commission, for the Division of Trading and Markets.

Joseph S. Schuchert, Jr., of Schuchert, Schuchert & Sheerer, for Strathmore Securities, Inc., Auldus H. Turner, Jr., Ronald D. Turner and T. Theodore Turner.

Theodore B. Henjum, pro se.

Ralph H. Demmler, Gilbert J. Helwig and Harry H. Weil, of Reed, Smith, Shaw & McClay, for Michael R. Ventura.

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Following extensive hearings in these proceedings pursuant to Sections 15(b) and 15A of the Securities Exchange Act of 1934 ("Exchange Act"), the hearing examiner filed an initial decision in which he concluded, among other things, that the registration as a broker and dealer of Strathmore Securities, Inc. ("registrant") should be revoked and that it should be expelled from membership in the National Association of Securities Dealers, Inc. ("NASD"); that Auldus

H. Turner, Jr., who was vice-president of registrant, should be barred from association with any broker or dealer; that Ronald D. Turner and T. Theodore Turner, salesmen of registrant, should be suspended from such association for twelve months; and that Theodore B. Henjum, a salesman of registrant, and Michael R. Ventura, a salesman of another broker-dealer, should be suspended from such association for thirty days. 1/ We granted petitions for review filed by these respondents, briefs were filed by them and by our Division of Trading and Markets ("Division"), and we heard oral argument. 2/ On the basis of an independent review of the record and for the reasons set forth herein and in the initial decision, we make the following findings.

I. Distribution of Stock Pursuant to Claimed Regulation A Exemption

On January 22, 1960, registrant became the underwriter with respect to a public offering by L. F. Popell Co., Inc. ("Popell Co.") of 100,000 shares of stock at $3 per share, which had commenced on December 21, 1959, pursuant to a claimed exemption under Regulation A from the registration requirements of the Securities Act. On March 10, 1960, Popell Co. filed a report of sales which stated that the offering had been completed on January 29, 1960 and that all the shares in the offering had been sold. However, we find that the distribution continued at least until September 1960, with sales being made at prices in excess of the $3 offering price.

Leo Popell, president of Popell Co., arranged for the sale in February 1960 of 18,500 shares at the offering price to the accounts of ten individuals designated by him who were relatives, friends or acquaintances, or employees or former employees of Popell Co. This was apparently done in order to effect the disposition of additional shares of the offering, which had in fact been unsuccessful, without Popell's being openly involved in the transactions because of his control status in the issuer and the registration requirements of the Securities Act. Transfers of 8,500 of those shares to six of the designees were effected through registrant. None of these six designees previously had an account with registrant or communicated with registrant to open accounts or order the purchase or subsequent sale of these shares. Two designees gave registrant a 90-day option to purchase the shares at 3¼. Payments for the shares allocated to five of these designees were made by checks that did not bear their names, and registrant did not send stock

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1/ Other respondents, Ethel I. Weber, who was a branch office manager of Blair F. Claybaugh & Company, then a registered broker-dealer, and Louis A. Moore, Alan J. Davis and Hugh M. Casper, who were salesmen for that firm, were suspended from association with any broker or dealer for various periods pursuant to the initial decision on the basis of their failure to petition for review. The examiner's decision also became final as to another Claybaugh salesman, as to whom the examiner imposed no sanction. The firm's registration as a broker-dealer was revoked in other proceedings. Siltronics, Inc., Securities Exchange Act Release No. 7158 (October 18, 1963).

2/ On October 13, 1967, we determined that it was not necessary or appropriate in the public interest to impose any sanction upon Henjum and discontinued the proceedings as to him. However, we indicated that formal findings and an opinion with respect to him as well as the other respondents would follow in due course.

certificates to two of them. The remaining 10,000 shares were transferred to two of the same designees and to the other four designees through a selling group member. None of these persons paid for the shares, payment being arranged by Leo Popell or other Popell Co. personnel. Between February 26 and September 26, 1960, Leo Popell caused the sale to registrant from the accounts of the ten designees of a total of 16,500 shares at prices ranging from 3 to 4-5/8, 3/ and between early February and September 1960, registrant sold those shares to customers and dealers at prices ranging from 3-3/8 to 6.

Registrant and A. Turner knew or under the circumstances should have known that the ten designees were not the actual purchasers and that a substantial portion of the Regulation A offering was transferred to them at the offering price with a view to its subsequent repurchase by registrant and distribution to the public. 4/ These respondents therefore must have been aware that the distribution was not completed on January 29 but continued until the resale to the public of the repurchased shares. As stated in Lewisohn Copper Corp., 5/ a distribution of securities comprises "the entire process by which in the course of a public offering the block of securities is dispersed and ultimately comes to rest in the hands of the investing public." By virtue of the distribution of the Popell shares after the purported completion date of the offering and at prices in excess of the stated offering price, no regulation A exemption was available for the public offering of such stock, and since no registration statement had been filed or was in effect with respect to that stock registrant and A. Turner in the offer, sale and delivery of such stock willfully violated Sections 5(a) and 5(c) of the Securities Act.

In addition, registrant did not disclose, at least to those customers who testified, 6/ the plan of distribution with respect to the portion of the offering represented by the shares transferred to the ten designees of Leo Popell and repurchased and distributed by registrant. 7/ Moreover, during its distribution of those shares, registrant purchased at least 35,000 shares from customers and dealers and, beginning in March 1960, entered bids for the stock on a daily basis in

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3/ Of the total of 16 purchases by registrant from the ten record owners, six were effected at prices substantially lower than its contemporaneous bids in the sheets published by the National Quotation Bureau, Inc., or the prices paid by registrant for purchases of such stock from others. Registrant sent the payments for its purchases from seven of the ten designees to various Popell Co. officials rather than to the designees.

4/ Cf. Atlantic Equities Company, Securities Exchange Act Release No. 8118, pp. 7-8 (July 11, 1967); Sidney Tager, Securities Exchange Act Release No. 7368, p. 5 (July 14, 1964), aff'd 344 F.2d 5 (C.A. 2, 1965).

5/ 38 S.E.C. 226, 234 (1958).

6/ In addition to the shares of the offering transferred to the Popell designees, registrant sold 60,140 shares between February 1 and 10, 1960, directly to customers at the stated offering price and to broker-dealers at that price less a discount.

7/ See R. A. Holman & Co., Inc., Securities Exchange Act Release No. 7770, pp. 4-5 (December 15, 1965), aff'd 366 F.2d 446 (C.A. 2, 1966), cert. denied, _____U.S. _____(December 4, 1967).

the National Quotation Bureau sheets. Such bids and purchases in the course of a distribution are expressly proscribed by the anti-manipulation provisions of Rule 10b-6 under the Exchange Act. 8/ By such conduct, registrant, together with or aided and abetted by A. Turner, willfully violated anti-fraud provisions of Section 17(a) of the Securities Act of 1933 and Sections 10(b) and 15(c)(1) of the Exchange Act and Rules 17 CFR 240.10b-5, 10b-6 and 15c1-2 thereunder.

2. Distribution of Stock issued in Exchange for Corporate Assets

On November 15, 1960, Popell Co. issued 28,600 shares of its stock to Perma Cement Products of America, Inc. ("Perma") in exchange for the latter's assets, pursuant to an agreement approved by Perma's 19 stockholders. Of those shares, 10,306 shares were distributed by Perma to nine of its stockholders, 8,294 shares, which were allocated to A. Turner for his assistance in arranging the exchange, were issued to Perma's vice-president as Turner's nominee, and the remaining 10,000 shares were placed in escrow with Popell Co. counsel against any unknown liabilities of Perma. In the offer and sale of such shares, as described below, registrant, A. Turner, R. Turner, T. Turner, Henjum, and Ventura willfully violated Sections 5(a) and 5(c) of the Securities Act.

Although Perma's shareholders, at Popell Co.'s request, had agreed to hold the Popell Co. shares for investment, sales of such shares commenced almost immediately and continued into 1962. Charles N. Caputo, Perma's president and an attorney, testified that a number of Perma's stockholders asked him to sell their Popell Co. shares, and that A. Turner or Charles E. Klein, then president of registrant, informed him that registrant would not handle such sales but offered the use of registrant's salesmen to find purchasers. It was agreed that such salesmen would sell the stock for investment at a price somewhat lower than the market price, and that Caputo would open a bank account as trustee to receive payments for the stock and disburse them to the Perma stockholders. Purchasers were to sign an investment letter, which was drafted by Caputo and counsel for Popell Co., stating that the stock would not be "transferred or recorded for at least one year."

Pursuant to these arrangements, 2,800 shares of the 10,306-share block were sold to eight customers between December 1 and 9, 1960, by registrant's salesmen, including T. Turner (1,200 shares to three customers) and R. Turner (500 shares to two customers), and by A. Turner. Of the 8,294 shares beneficially owned by A. Turner, 1,100 shares were sold between December 1960 and February 1961 to five customers, including two of the eight customers previously mentioned, by registrant's salesmen, including T. and R. Turner and Henjum (each of whom sold 100 shares to a customer), with the payments being made first to the Caputo trustee account and, beginning in January 1961, to the account of Harvey E. Schauffler, Jr., an attorney, who succeeded Caputo as trustee. 9/ An additional 3,000 shares out of the two blocks of 10,306 shares and 8,294 shares were sold in December 1960 and January 1961 by salesmen for another broker-dealer to whom A. Turner allotted such shares. Between September 26, 1961, when the 10,000 escrowed shares were released, and January 25, 1962, sales of 2,500

8/ Ibid., at p. 5 of cited Release.

9/ Schauffler testified that his trustee account was opened with a de-

shares of such stock were effected to six customers including a previous purchaser, by registrant's salesmen, including R. Turner who sold 500 shares to one customer. The proceeds of these sales were similarly paid into the trustee accounts.

Although, according to Caputo, A. Turner or Klein had stated that registrant would not itself handle the sale of any Popell stock for the Perma shareholders, it in fact did effect sales of a total of 8,590 shares without using the trustee accounts. Thus, between March and October 1961 registrant sold 3,030 shares of the 10,306 shares initially distributed to Perma shareholders, between September 1961 and April 1962 sold 3,194 shares of the block beneficially owned by A. Turner, and by January 25, 1962, sold 2,366 shares of the escrowed stock. The purchasers included at least nine individuals, one of whom had made a previous purchase from a Perma stockholder, and two broker-dealers. T. Turner was responsible for the sale of 1,750 shares to two customers.

Registrant and the Turners contend that the sales of Popell Co. stock by the Perma stockholders were exempt from registration pursuant to Section 4(1) of the Securities Act as "transactions by any person other than an issuer, underwriter, or dealer." We do not agree. Although under Securities Act Rule 17 CFR 230.133 the exchange of Popell Co. stock for the assets of Perma did not constitute a sale of such stock with respect to Perma's stockholders for purposes of the registration provisions of the Act, any control person of Perma who acquired such stock with a view to distribution is deemed to be an underwriter under the Rule. Caputo, who held about 30% of Perma stock, was clearly a control person of Perma. Respondents assert that he sold the bulk of the 5,577 Popell Co. shares received by him in the exchange in unsolicited brokers' transactions, and therefore he would not be deemed to be an underwriter nor to have engaged in a distribution under paragraphs (d) and (e) of the Rule because the stock sold by him within a period of six months did not exceed 1% of the stock outstanding. 10/ In fact, 1,500 of Caputo's shares were sold by registrant prior to October 23, 1961, and since registrant's offers in the sheets during this period constituted solicitations of orders to buy, 11/ the exception in Rule 133 would not cover such sales. In any event, registrant admitted that its sales of 1,000 of such shares were solicited.

Moreover, the record supports the finding of the hearing examiner that all the Perma stockholders were members of a control group of Perma dominated by Caputo, and it is clear that the sales by such group (even assuming they were effected in unsolicited brokerage transactions) exceeded 1%. Perma was a small corporation and most of its 19 stockholders were united by family, personal or business ties and acted in concert with or acquiesced in the actions of Caputo as their leader. Although, as previously mentioned, they had agreed to hold the Popell Co. stock for investment, most of the Perma stockholders who participated in the initial allocation of Popell Co. shares arranged with Caputo, shortly after the exchange, for the sale of such stock, and thereafter a number of the Perma stockholders, including those whose stock was held in escrow, sold their shares directly through registrant or through the Schauffler trustee account.

10/ Popell Co. had outstanding a total of approximately 300,000 shares during the period in question.

11/ Securities Act Release No. 4818, p. 4 (January 21, 1966).

We reject respondents' contention that the Perma control group did not acquire the Popell Co. stock with a view to distribution and therefore was not an underwriter within the meaning of Rule 133. Respondents assert that sales by the group did not constitute a public offering because they were limited to about 20 persons and those persons were stockholders of Popell Co. with access to information about the issuer, in most instances executed investment letters, and held the shares for a long period before reselling them. Respondents, who have the burden of proving the availability of an exemption, 12/ have not established that there were only 20 purchasers, or that there were no additional offerees who did not effect purchases. Indeed, on this record, there is a basis for inferring that there were considerably more than 20 purchasers and offerees. As we have seen, a substantial number of shares were sold within a year to broker-dealers, and respondents have not asserted that such broker-dealers did not purchase for distribution. Nor have respondents established that sales, as well as offers, were confined to Popell Co. stockholders by the broker-dealers to whom registrant effected sales. In any event, the number of persons to whom shares are offered is not determinative of the question whether a distribution or public offering is involved, and respondents have not shown that those offerees who were stockholders of Popell Co. had such a special relationship to it as to "have access to the same kind of information" that registration would disclose. 13/ Moreover, investment letters signed by purchasers are "necessarily self-serving and not conclusive" as to their actual intent. 14/ As we stated in Elliott & Company: 15/

> "The basic policy of registration under the Securities Act may not be frustrated by the technique of mechanically obtaining so-called investment intent letters from . . . purchasers."

Indeed, "a limitation upon resale for a stated period of time," in this case one year, "would tend to raise a question as to original intent." 16/ And it is not claimed that investment letters were signed

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12/ S.E.C. v. Ralston Purina Company, 346 U.S. 119 (1953). See also Robinette & Co., Inc., Securities Exchange Act Release No. 7386, p. 3 (August 11, 1964); Gilligan, Will & Co. v. S.E.C. 267 F.2d 461 (C.A. 2, 1959), cert. denied 361 U. S. 896.

13/ S.E.C. v. Ralston Purina Company, supra, 346 U.S. at 125-6. See also S.E.C. v. Sunbeam Gold Mines Co., 95 F.2d 699, 702 (C.A. 9, 1938); Robinette & Co., Inc., supra.

14/ Securities Act Release No. 4552 (November 6, 1962). See also U. S. v. Custer Channel Wing Corporation, 247 F. Supp. 481, 489-90 (D. Md., 1965), aff'd 376 F.2d 675 (C.A. 4, 1967).

15/ 38 S.E.C. 381, 385 (1958).

16/ Securities Act Release No. 4552 (November 6, 1962).

by the broker-dealers to whom Popell Co. stock was sold by registrant. 17/

We also reject the contention of R. and T. Turner that any violations of Section 5 by them were not willful. They assert that they were unaware of any wrongdoing, were subject to the direction of their superiors and were told they could make private placements, and knew that Caputo and Schauffler were attorneys who were responsible for the receipt and disbursement of funds and for the preparation of the investment letters. However, salesmen, no less than broker-dealers, should be aware of the requirements necessary to establish an exemption from the registration requirements of the Securities Act, and they should be reasonably certain such an exemption is available, particularly in circumstances where their activities depart from normal business practices as the Turners' activity did. The distribution of the Popell Co. stock outside of the normal channels used by registrant; the one-year limitation in the investment letters; and the number of persons to whom they offered Popell Co., stock all should have caused these salesmen to question the availability of an exemption from the registration provisions of the Securities Act. Their customers, although stockholders of Popell Co., were entitled to the protection of registration, and the right to such protection was not nullified by the signing of the investment letters. Nor would the participation by lawyers preclude a finding of willfulness. 18/

As to Ventura, the record shows that he had known Caputo, who had an account with his employer, for a long time, and that in late 1960 Caputo asked him to make a private placement of Popell Co. stock for a client. Caputo could not recall informing Ventura at that time why the stock could not be freely traded. Ventura did not produce a buyer. In April 1961, at Caputo's request, Ventura sold 900 shares of Popell Co. stock for Caputo's account. Caputo testified that he indicated to Ventura at that time that the stock was freely tradeable. In August 1962, Ventura sold two additional shares for Caputo's account at his request, and Caputo suggested that Ventura call two of Caputo's clients who also wished to sell Popell Co. stock. Ventura obtained information from those persons as to their employment and sold a total of 246 shares for them. One of them, for whom Ventura sold 207 shares, held those shares as a nominee of Caputo. The record does not show whether the shares of the other client were part of the shares issued

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17/ No exemption from registration was available, as respondents further contend, under Section 4(2) of the Securities Act which relates to "transactions by an issuer not involving any public offering," since those shareholders obviously were not issuers. Our conclusion above that those persons were underwriters because they acquired the Popell Co. stock with a view to distribution has disposed of the question of the availability of an exemption under Section 4(1) which is the only section that is applicable.

18/ Cf. Morris J. Reiter, 41 S.E.C. 137, 141 (1962); The Whitehall Corporation, 38 S.E.C. 259, 270 (1958); Cornelis De Vroedt, 38 S.E.C. 176, 180 (1958). See Tager v. S.E.C., 344 F.2d 5, 8 (C.A. 2, 1965): "It has been uniformly held that 'willfully' in this context means intentionally committing the act which constitutes the violation. There is no requirement that the actor also be aware that he is violating one of the Rules or Acts."

to him as a result of the exchange of Popell Co. stock for Perma's assets. In September 1962, Ventura sold 45 shares for Caputo, and at his order, 1,243 shares for two other clients, after Ventura ascertained the nature of the employment of one and of the husband of the other. Of the 1,180 shares sold for one of these clients, 1,122 shares were beneficially owned by Caputo. 19/ Altogether, between April 1961 and September 1962, Ventura sold 2,436 shares of unregistered Popell Co. stock for Caputo and his clients.

Ventura contends that the sales by him, which were handled by the trader in the firm with which he was associated, were exempt from registration under Section 4(4) of the Securities Act as broker's transactions executed upon purchasers' unsolicited orders. In our opinion, Ventura has not sustained his burden of establishing the availability of such exemption. His testimony that he gave the sell orders to the trader does not negate the possibility that customers' orders were solicited. But even assuming that the purchases were not solicited, the circumstances were such as to alert Ventura to make further inquiry as to the source of the shares. 20/

Ventura argues that his investigation was adequate under the circumstances then known to him. He asserts that he did not know that Caputo beneficially owned 1,329 of the shares sold for two clients, that there was no reason for further inquiry because of the small size of the transactions and the recommendations of the sellers by Caputo whom he knew to be a reputable attorney, and that the nature of the employment of Caputo's clients made it highly unlikely that any of them was a control person of Popell Co.

A salesman is required, however, to make certain basic inquiries concerning the sellers and the source of their stock when he is asked by unknown persons to sell substantial amounts of little known securities. Ventura did not know two of the clients and had never done business with the other two and was acquainted with one or both of them only on a casual social basis. The transactions were not small. Ventura's first transaction for Caputo amounted to about $6,650, and his transactions for two of Caputo's clients to about $3,400 and $22,800, respectively. Caputo's inquiry of Ventura in late 1960 concerning a private placement of Popell Co. shares should have indicated that Caputo believed registration to be required for such shares unless a private offering exemption were available. He did not question Caputo or use his employer's facilities to determine whether his sales were part of a larger distribution. The account cards prepared by Ventura for two of the clients listed as their telephone number what he recognized to be Caputo's office telephone number and Ventura caused most of the checks and confirmations to be sent to Caputo's office. Although he

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19/ Caputo testified that the purpose of the nominee arrangements was "personal," and he was not asked to elaborate.

20/ Cf. Rule 17 CFR 230.154, which defines "brokers' transactions" in Section 4(4) of the Securities Act to include transactions by a broker in behalf of a controlling person of the issuer, where, among other things, "the broker is not aware of circumstances indicating that his principal is an underwriter in respect of the securities or that the transactions are part of a distribution of securities on behalf of his principal." See Securities Act Release No. 4818 (January 21, 1966).

"looked" at Popell Co. advertising materials which his employer had on file, he did not attempt to ascertain whether a registration statement was in effect with respect to the stock, did not inquire as to the source of his principals' stock, and remained ignorant of the Popell Co.'s acquisition of Perma. We consider that the inquiries he did make were substantially deficient. 21/

Ventura asserts that further inquiry would have been fruitless. We disagree, although we need not speculate as to what reasonable inquiry would have disclosed where no such inquiry is made. Ventura admits that additional questioning might have revealed Caputo's nominee arrangements, but discounts their significance. More diligence should have disclosed the acquisition of Perma, Caputo's position in that company, and the immediate commencement of the distribution by the Perma stockholders.

Ventura contends that additional inquiry would merely have indicated the propriety of the transactions, arguing that the former Perma stockholders did not constitute a control group of Perma, and that under Rule 133 neither Caputo nor any other Perma stockholders assumed to be control persons would be deemed to be underwriters because assertedly they sold their Popell Co. stock in unsolicited brokers' transactions and the amount sold by each such stockholder within a period of six months did not exceed 1% of the stock outstanding. We have already found that Caputo sold at least 1,500 shares through solicited broker's transactions, and that the Perma stockholders were members of a control group whose sales exceeded 1% of the outstanding stock. But Ventura further asserts that Rule 133, in defining an underwriter, applies only to "any person" who controls the constituent corporation, and that the first intimation that a control group of a constituent company might be deemed an underwriter and its sales lumped together for purposes of the 1% test in Rule 133 appeared in a Commission Release issued on February 17, 1964, 22/ long after Ventura's last transaction. The group concept, however, is not new, having previously been applied in a court decision which involved that Rule. In 1959, the Court of Appeals for the Second Circuit expressly held that Rule 133 does not provide an exemption for a subsequent sale of unregistered stock by a control group of the constituent company. 23/ Moreover, we held in 1950 that a number of stockholders who distributed shares of the issuer through broker-dealers were members of a cohesive group in control of the issuer, and therefore were "issuers" within the meaning of Section 2(11) of the Securities Act, even though the term "issuer" is defined to include "any person" controlling the issuer. 24/

In view of Ventura's failure to make reasonable inquiry despite the various factors which should have alerted him to the need for such inquiry, 25/ we conclude that his violations were willful. Ventura's

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21/ See Century Securities Company, Securities Exchange Act Release No. 8123, p. 9 (July 14, 1967).

22/ Securities Act Release No. 4669 (superseded by No. 4818 (January 21, 1966)).

23/ S.E.C. v. Culpepper, 270 F.2d 241, 247-8 (C.A. 2, 1959).

24/ The S. T. Jackson & Company, Inc., 36 S.E.C. 631 (1950).

25/ See S.E.C. v. Culpepper, supra, 270 F.2d at 250-1; S.E.C. v. Mono-Kearsarge Consolidated Mining Company 167 F. Supp. 248, 261 (D. Utah, 1958).

contention that even if he were negligent, it would not constitute willfulness and that gross negligence must be shown is rejected. We hold that careless disregard of his responsibilities as a securities salesman was enough. 26/

3. Distribution of Stock Issued in Exchange for Shares of Stockholders in Another Corporation

Similar willful violations of Sections 5(a) and 5(c) of the Securities Act were committed by registrant, A. Turner, R. Turner and T. Turner following the issuance by Popell Co. on December 27, 1961 of 50,139 shares of its stock to the stockholders of Manor Lake Development Corporation ("Manor Lake") in exchange for their shares. Klein, who was president of Manor Lake as well as of registrant, received 3,065 Popell Co. shares, A. Turner, a director, 2,440 shares, Walter Criste, secretary and counsel for Manor Lake, 750 shares, and Schauffler, a principal stockholder, 9,500 shares. An additional 10,000 shares were issued in Criste's name with the understanding that they would be sold through registrant and the proceeds used to discharge a mortgage on Manor Lake property.

Sales of the Popell Co. shares commenced within a month after their issuance to the Manor Lake shareholders. Registrant sold 2,000 shares to six customers in October and November 1961 and made delivery by using 1,000 of A. Turner's shares and 1,000 of Klein's shares purchased from them in January 1962. It sold 1,000 Popell Co. shares to thirteen customers in January and February 1962 and made delivery with shares it purchased from Klein in March 1962. In addition, 1,440 of A. Turner's shares were sold by or through registrant to various customers and to other broker-dealers in February 1962 and thereafter. Registrant also purchased 1,000 shares of Schauffler's Popell Co. stock in April 1962 and used them to make delivery in sales made to four persons during the preceding month. It purchased an additional 2,000 shares from Schauffler in July and August 1962, and subsequently resold them to various brokers.

In December 1961 and January 1962 registrant purchased 1,570 of the 10,000 shares issued in Criste's name and sold them to various customers. Its salesmen, generally using the procedures employed in the sale of Popell Co. shares held by the Perma shareholders through the trustee bank accounts, also arranged sales of 3,800 shares of the same block to seven individuals. T. Turner was responsible for a sale of 500 shares to one customer and R. Turner for 100 shares to one customer. Payments were made to the Schauffler trustee account, to a trustee bank account which Criste had opened, and in one instance directly to Manor Lake's mortgagee. Further, registrant supplied a Claybaugh salesman with 500 of 1,500 shares in Criste's name that the salesman sold to a customer in February 1962.

No Section 4(1) exemption was available for the sales of Popell Co. stock by Klein, A. Turner, Criste, and Schauffler. We agree with the findings of the hearing examiner that these individuals constituted a control group of Manor Lake and that such group acquired the Popell Co. shares with a view to distribution and was therefore an underwriter under the terms of Rule 133. Klein was the dominant figure in the group and, with A. Turner's assistance, was instrumental in arranging for the

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26/ See Mayflower Associates, Inc., 38 S.E.C. 110 (1957); Loss, Securities Regulation (1961 ed.), p. 1309.

agreement with Popell Co. 27/ Criste supported Klein and executed stock powers to him with respect to the 10,000 shares issued in his name but delivered to Klein. Schauffler occupied a strategic position by virtue of his ownership of 19% of Manor Lake's stock, with the remaining shares held by more than 200 persons, and he acquiesced in or implicitly supported the actions of Klein and A. Turner.

Nor was a private offering exemption under Section 4(2) available for the sales of the stock in Criste's name as "investment stock," which were assertedly made to only eight persons who were stockholders of Popell Co. Our reasons set forth earlier for rejecting the similar contention with respect to the sales of Popell Co. shares by the former Perma stockholders need not be repeated here. Moreover, as in the case of the Perma exchange, Popell Co. shares were sold to undisclosed customers by registrant. The contention of R. and T. Turner that their sales of shares issued in Criste's name did not constitute willful violations is rejected for the reasons discussed in connection with their sales on behalf of the former Perma stockholders.

Failure to Maintain Books and Records

Registrant, aided and abetted by A. Turner, willfully violated the record-keeping requirements of Section 17(a) of the Exchange Act and Rule 17 CFR 240.17a-3 thereunder in that it failed to record its transactions in the Popell Co. stock received by Perma and Manor Lake stockholders and effected through the Caputo, Schauffler, and Criste trustee bank accounts, as described earlier in this opinion.

Registrant and A. Turner assert that they did not suggest the opening of the trustee accounts, that such accounts are merely a conventional tool used by attorneys to assure the proper handling of transactions, and that registrant did not act as principal or agent in any of those transactions and received no compensation in connection with them. However, most of the sales were negotiated by registrant's salesmen, including R. and T. Turner and Henjum, who solicited customers after receiving detailed instructions from A. Turner and used registrant's office facilities in effecting sales. A. Turner personally solicited customers and effected sales. As previously mentioned, 10,000 shares were issued in Criste's name with the understanding that they would be sold to or through registrant, and the Criste as well as the Schauffler trustee account was used with respect to a substantial portion of those shares.

Moreover, disbursements at least from the Schauffler and Criste trustee accounts were controlled by Klein or A. Turner. When Schauffler became trustee, 28/ Caputo instructed him to follow any instructions he might receive from them. On January 25, 1961, pursuant to such instructions, Schauffler remitted $5,000 to registrant in payment for certain securities purchased by it. 29/ In addition, a year later, Schauffler

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27/ In late 1961, Klein suffered the first of a series of heart attacks that culminated in his death in February 1964. However, notwithstanding respondents' contrary assertion, it is clear that he continued to dominate Manor Lake's affairs until shareholder approval of the acquisition.

28/ As previously mentioned, Schauffler testified that the opening deposit of $10,450 in his trustee account was made with a check by registrant.

29/ Schauffler had deposited a $5,000 check drawn by registrant on the preceding day. The record does not disclose the source of those funds.

executed a check for $10,000 to Klein and one in the same amount to A. Turner. While Klein and A. Turner executed notes providing for repayment in 36 and 42 months, respectively, such long-term loans were inconsistent with the stated purpose of the trustee account. 30/ Schauffler also forwarded $6,000 to a broker-dealer in March 1962 in satisfaction of a personal obligation of A. Turner. 31/

The hearing examiner found that the transactions effected in the trustee accounts by registrant's salesmen and A. Turner were in fact registrant's transactions. We find that, at the least, the handling of the transactions was under the control of registrant and its principals, and those transactions should have been recorded on registrant's books.

Other Matters

Registrant and the Turners contend that they were denied due process by our staff's allegedly wrongful retention of their books and records. On February 19, 1964, registrant transferred certain records reflecting its transactions in Popell Co. stock to a staff investigator who executed a receipt promising their return within thirty days. Our staff was unable to complete its examination within such period, and registrant's counsel advised it that return of the books was not then required. On May 21, 1964, registrant turned over other books and records to the staff and a similar receipt was executed undertaking to return them within thirty days.

Upon the request of A. Turner, who had been subpoenaed to testify in the investigation, that examination of the records be permitted. they were made available at a federal building from September 27 to October 16 without restriction to normal working hours. 32/ Registrant's representatives examined the records under this arrangement for a total of less than eleven hours and did not request an extension. Registrant's books and records were subpoenaed by the staff in November 1964 and these proceedings were instituted in January 1965.

These respondents assert that our staff's retention of registrant's records impeded their ability to ascertain and investigate sources of relevant information as well as to check the details of particular transactions. They further assert that making the records available at the federal building for three weeks was inadequate because their examination was hindered by the presence of staff personnel and because an investigator employed by registrant was taken ill.

We recognize that a respondent must not be hindered from preparing an adequate defense by staff denial of access to their records and that our staff must return such records after a reasonable time taking into

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30/ No effort to collect the ostensible loan to Klein, which was overdue, had been made at the time Schauffler testified in February 1965. Schauffler stated that because of these proceedings and out of consideration for Klein's widow, Caputo had decided not to take immediate action. Repayment of the purported loan to A. Turner was not yet due at the time.

31/ Schauffler testified that he regarded this payment as a loan to A. Turner and it appears that the trustee account was reimbursed in September 1962.

32/ The Division disputes respondents' claim that they had previously orally requested return of the records.

account the purposes for which they were produced. 33/ While the staff's retention of respondents' books for the period involved here does raise a question whether the period of retention was reasonable, no showing of prejudice to respondents has been made. 34/ Respondents had ample opportunity to examine the books and records in the federal building. The Division states that the employee who had custody of the books had been instructed to absent himself when registrant's representatives were present and respondents have cited no specific instance of interference by him. If other circumstances prevented respondents from taking full advantage of the arrangement, they could have requested an extension and no explanation of their failure to do so has been offered.

In addition, respondents had further opportunities to examine their records during the hearings. The hearings were recessed for a total of 120 calendar days. The hearing examiner, although denying respondents' motions for an extended recess and sole possession of registrant's records, advised them that he would adjourn the hearings for any period reasonably necessary for the preparation of their defense and not merely, as they assert, to prepare for cross-examination. Despite this offer, respondents introduced no evidence after the Division had completed its case, claiming, among other things, that their ability to do so had been undermined by lack of access to the records.

We also note that the preparation of respondents' case was facilitated by the introduction in evidence of charts prepared by the staff tracing the sales of Popell Co. shares by the Perma and Manor Lake shareholders. The charts listed the record buyers and sellers and the dates, sale prices and volume of sales, and the accuracy of such data was stipulated after an agreement upon certain corrections. In view of these charts and the fact that respondents necessarily were familiar with the relevant transactions in which they participated, we do not consider that respondents were prejudiced by the extended period of time required by the staff to prepare its case.

Registrant and A. Turner also complain that the hearing examiner improperly drew the inference from A. Turner's failure to testify concerning facts and circumstances peculiarly within his knowledge that such testimony would have been adverse. He was called as a witness by the Division but refused to answer any questions, except those concerning the extent of his stock ownership in registrant and his official position and duties, on the ground that his answers might tend to incriminate him. Our proceedings are civil in nature 35/ and the weight of authority permits an adverse inference to be drawn in such proceedings from the failure of a party to testify or even from the invocation

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33/ Cf. John Rosenblum, Inc. v. Gillespie, 187 F. Supp. 258, 260 (S.D. N.Y., 1960); Bendix Aviation Corporation, 58 F. Supp. 953 (S.D. N.Y., 1945).

34/ See Bornn v. Page, 14 F. Supp. 767, 768 (E.D. N.Y., 1936).

35/ See Blaise D'Antoni & Associates, Inc. v. S.E.C., 289 F.2d 276, 277 (C.A. 5, 1961), rehearing denied, 290 F.2d 688, cert. denied, 368 U. S. 899; Associated Securities Corp. v. S.E.C., 283 F.2d 773, 775 (C.A. 10, 1960); Pierce v. S.E.C., 239 F.2d 160, 163 (C.A. 9, 1956); Wright v. S.E.C., 112 F.2d 89, 94 (C.A. 2, 1940).

of the privilege against self-incrimination. 36/ However, although the examiner considered that it was appropriate to draw an adverse inference, he indicated that it was unnecessary to do so since, in his opinion, his findings were warranted without such an inference, and we have not relied on any such inference.

Ventura contends that the refusal of the hearing examiner and the Commission to sever the proceedings as to him violated his rights under the due process clause and the Administrative Procedure Act. He asserts that the accumulation of evidence on the charges of conspiracy and fraud which were not pertinent to him probably resulted in confusing the facts and arguments relevant to the other respondents with those relevant to him. We do not agree. These proceedings involve a number of questions of law and fact common to the issues affecting Ventura and the other respondents, including the organization and operation of Perma, the circumstances surrounding its acquisition by Popell Co., the subsequent sales of Popell Co. stock by Perma's shareholders, and the availability of a Section 4(1) exemption. All of those questions were subjects of extensive proof and argument, and separate proceedings would have been uneconomical. Moreover, the hearing examiner is legally trained and judicially oriented and his findings and conclusions have been reviewed by us. 37/

Public Interest

We agree with the hearing examiner that registrant's registration as a broker-dealer should be revoked, that it should be expelled from the NASD, and that A. Turner should be barred from association with any broker or dealer. The extensive violations we have found demonstrate gross indifference to the requirements of the securities laws and are inconsistent with the continued engagement of registrant in the securities industry. These are not the first disciplinary proceedings against them. In 1959 the NASD fined registrant for sales of securities at unfair prices. In April 1966, we sustained the NASD's findings of similar violations by registrant and A. Turner and of violations of Regulation T by registrant, and registrant's membership in the NASD and A. Turner's registration as a registered representative was suspended for 90 days. 38/ And on July 11, 1967, we suspended registrant from

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36/ 8 Wigmore, EVIDENCE §2272 (3rd ed. 1940). See also In re Sterling Harris Ford, Inc., 315 F.2d 275, 279 (C.A. 7, 1963), cert. denied, 375 U.S. 814; Rubenstein v. Kleven, 150 F. Supp., 47, 48 (D. Mass., 1957); N. Sims Organ, 40 S.E.C. 573, 577 (1961), aff'd 293 F.2d 78, 80-81 (C.A. 2, 1961), cert. denied, 368 U.S. 968.

37/ Cf. Marketlines, Inc., Investment Advisers Act Release No. 206, p. 8 (January 20, 1967), aff'd, ____F.2d ____ (C.A. 2, October 9, 1967); J. A. Winston & Co., Inc., Securities Exchange Act Release No. 7337, pp. 11-12 (June 8, 1964); Clinton Engines Corporation, 41 S.E.C. 408, 410 (1963); See also Donnelly Garment Co. v. N.L.R.B., 123 F.2d 215, 224 (C.A. 8, 1942): "One who is capable of ruling accurately upon the admissibility of evidence is equally capable of sifting it accurately after it has been received."

38/ Strathmore Securities, Inc., Securities Exchange Act Release No. 7864 (April 18, 1966), aff'd C.A.D.C., No. 20,175, January 3, 1967, cert. denied 387 U.S. 918.

membership in the NASD for 90 days and named A. Turner a cause of such suspension on the basis of findings of their participation in a scheme to defraud in the sale of a "hot issue" and of violations of the registration provisions. 39/

Although the violations committed by R. and T. Turner and Ventura are of a serious nature, they were not found to involve fraud, and these are the first disciplinary proceedings against them. Moreover, the record does not indicate they committed any violation in connection with the Regulation A offering of Popell stock, and, unlike A. Turner, they were not deeply involved as participants in the other distribution of Popell Co. stock. Ventura's participation in the distribution, unlike that of R. and T. Turner, was peripheral in nature. He was not involved in sales of so-called "investment stock" through the trustee accounts and it does not appear that he personally solicited purchases. Under the circumstances, we consider it appropriate in the public interest to reduce the 12 months' suspensions of R. and T. Turner to 90 days and to censure rather than suspend Ventura.

An appropriate order will issue.

By the Commission (Commissioners OWENS, BUDGE, and WHEAT), Chairman COHEN and Commissioner SMITH not participating.

Orval L. DuBois
Secretary

39/ Atlantic Equities Company, Securities Exchange Act Release No. 8118.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
December 13, 1967

In the Matter of	
STRATHMORE SECURITIES, INC. 605 Park Building 355 5th Avenue Pittsburgh, Pennsylvania	ORDER REVOKING BROKER-DEALER REGISTRATION, EXPELLING FROM REGISTERED SECURITIES ASSOCIATION, AND BARRING, SUSPENDING, AND CENSURING INDIVIDUALS
AULDUS H. TURNER, JR. THEODORE B. HENJUM RONALD D. TURNER T. THEODORE TURNER	
(8-7323)	
MICHAEL R. VENTURA 304 Wood Street Pittsburgh, Pennsylvania	
Securities Exchange Act of 1934 - Sections 15(b) and 15A	

Proceedings having been instituted pursuant to Sections 15(b) and 15A of the Securities Exchange Act of 1934 to determine, among other things, what if any remedial action is appropriate in the public interest with respect to Strathmore Securities, Inc., Auldus H. Turner, Jr., Theodore B. Henjum, Ronald D. Turner, T. Theodore Turner and Michael R. Ventura;

Hearings having been held after appropriate notice, the hearing examiner having filed an initial decision, petitions for review having been granted, and oral argument having been heard;

The proceedings with respect to Theodore B. Henjum having been discontinued;

The Commission having this day issued its Findings and Opinion; on the basis of said Findings and Opinion

IT IS ORDERED that the registration as a broker and dealer of Strathmore Securities, Inc. be, and it hereby is, revoked and that Strathmore Securities, Inc. be, and it hereby is, expelled from membership in the National Association of Securities Dealers, Inc.; that Auldus H. Turner, Jr. be, and he hereby is, barred from being associated with any broker or dealer; that Ronald D. Turner and T. Theodore Turner be, and they hereby are, suspended from being associated with any broker or dealer for 90 days; and that Michael R. Ventura be, and he hereby is, censured.

Orval L. DuBois
Secretary

[Division's Supplemental Reply Brief Following Oral Argument Before the Commission, dated November 18, 1966]

On February 19, 1964, during the investigation of these matters, the Commission's Washington Regional Office (WRO) obtained from Strathmore certain records relating to transactions in L. F. Popell Co., Inc. stock. In connection with obtaining these records the WRO Administrator advised respondents' counsel[2] that we would require the records for approximately thirty (30) days and would return them at the end of that time. It was in this context that a WRO staff member signed a receipt reflecting this agreement, when he took possession of the books and records.[3] At the end of the thirty (30) day period the WRO staff member advised the Administrator that he had not been able to complete his examination of the Strathmore records and was having difficulty, since many of the sales in which he was interested were apparently not reflected on the Strathmore records. The Administrator thereupon telephoned respondents' counsel and advised him that we would require the records for an indefinite period. Respondents' counsel agreed to the extension of time and stated that the records were not needed at that time. Further, respondents' counsel advised the WRO Administrator that the president of Strathmore had died recently and that Strathmore was therefore "in no hurry for the books and records" at that time and would make other arrangements for them.[4]

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[2]It is significant to note that during the entire investigation of these matters as well as during the proceedings herein, Mr. Joseph S. Schuchert, Esquire was counsel for Strathmore and A. Turner.

[3]Although the records obtained included Strathmore Daily Blotters, the original copies of various customers' account cards, which also reflected the transactions in Popell stock, were left at the Strathmore offices for their review and use.

[4]See TR. 721, 730.

No further communication with Strathmore regarding any records occurred until May 21, 1964. On that date the WRO obtained additional records from Strathmore relating to Popell stock transactions, but there was no request by Strathmore for return of the records obtained in February 1964. A receipt for these additional records was prepared by Strathmore personnel and signed by a WRO staff member, enumerating the records and indicating that such records would be returned in 30 days. However, in view of the earlier telephone conversation between respondents' counsel and the WRO Administrator as described above, it was assumed that the 30 day provision was not binding on these records as well and that other arrangements would be made for their return. The reasonableness of this assumption is supported by the fact that no request was made for the return of any records during the period after May 21, 1964 to September 16, 1964.

* * *

On August 24, 1964 an administrative subpoena *Duces Tecum* was issued to respondent A. Turner returnable on September 2, 1964. Respondents' counsel thereafter telephoned the WRO Administrator and requested a postponement of the interrogation until September 16. On September 16 respondents' counsel appeared and stated that he would not allow his client to testify until he had an opportunity to review Strathmore's books and records. In response to Division counsel's question as to how long a continuance he needed, Mr. Schuchert, respondents' counsel, said:[7]

> "A minimum period of two weeks after we get possession, *or the joint right to utilize the records.* I'm not asking—Mr. Turner's record, I think, indicates that he has always been most cooperative with the

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[7]See investigative transcript of testimony of September 16, 1964, pages 15-16; (attached hereto as "Appendix A").

> Washington Regional Office and with the Commission in general. We don't want to do anything which would impair your efforts.
>
> Nonetheless, *the minimum that we would request is joint access to those records*." (Emphasis added)

There was no representation by respondents that they had been prejudiced in any manner as a result of our having the records. It was therefore agreed on September 16, 1964 that Strathmore and the WRO would have "joint access" to the records for at least two weeks or whatever further time A. Turner needed to prepare himself to testify in the investigation. Pursuant to this agreement, all Strathmore records in our possession were delivered to a suite of rooms in the Federal Building in Pittsburgh[8] where they could examine and discuss the records out of the presence of Commission personnel. However, respondents and their representatives reviewed the records a total of ten hours during a three week period and did not ask for additional time to review the records.[9]

On October 20, 1964 A. Turner, pursuant to the above arrangements, appeared again so that the staff might take his testimony. A. Turner refused to answer any questions, invoking his privilege against self-incrimination. Mr. Schuchert, respondents' counsel, said:

> "Although we are very appreciative of the agreement that the representatives of the Washington Regional Office made with us, *and we do appreciate the inconvenience that they went to to make these records available*, after consideration of this entire Popell matter, including such factors as the length of time that the Commission has been conducting an investi-

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[8]See TR. 37-40.

[9]See TR. 39-40.

gation, the complexity of the investigation, the complexity of the various transactions, after trying to piece together not only to Mr. Turner's satisfaction but to the satisfaction of counsel, the overall picture of transactions in the Popell matter, and especially in light of the fact that Mr. Klein is deceased and he was the administrative officer of Strathmore Securities, I have come here today and I have advised my client, Mr. Turner, at this time to refuse to answer any questions with respect to the L. F. Popell matter on the grounds that they may tend to incriminate him."[10] (Emphasis added)

The statements of respondents' counsel show that the "joint access" arrangement had afforded respondents the same opportunity to utilize the records that would have resulted had respondents been given sole possession of them. Further, respondents did not request additional time to review the records for the purpose of any investigation they were undertaking or for any other purpose. Also, respondents did not make any claim at that time that our earlier possession of the records or the "joint access" arrangement had prevented or hindered any preparation they contemplated in anticipation of charges being brought against them.

On January 7, 1965 these administrative proceedings were instituted by the Commission. On January 12, 1965 respondent A. Turner and respondents' counsel came to the WRO to discuss these proceedings, since they were to commence on February 1, 1965. Respondents requested the return of all Strathmore records in the possession of the WRO. The WRO denied this request since it was contemplated that certain of them would be used at the hearing, but offered to

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[10] See investigative transcript of testimony dated October 20, 1964, pages 3-4; (attached hereto as "Appendix B").

make these records available to respondents under the same circumstances that they had been made available in September and October of 1964.[11] For the first time respondents' counsel advised the staff that these arrangements were unsatisfactory to him.

* * *

The respondents further argue that the Division's and the Hearing Examiner's refusal to return the books and records was additionally unreasonable because the respondents had offered to photocopy its records. In their brief, the respondents state that the Division rejected the idea of photostating the records at Strathmore's expense and in support of that contention they cite page 735 of the record herein. On the contrary, the transcript reflects on page 731 that respondents' counsel stated that ". . .we have told the Commission they have had these books and records and they could make copies of every document there and return the originals to us." A long discussion ensued thereafter and the Division agreed to attempt to photocopy certain of these books and records (TR. 739). The record then plainly shows that it was not the respondents who offered to photocopy these records, but it was the Division and even that was not satisfactory to the respondents (Tr. 1088).

* * *

[Appendix A to Division's Supplemental Reply Brief
Following Oral Argument Before the Commission
(Transcript of testimony of Aldus H. Turner, Jr.,
taken on September 16, 1964 pursuant to Commission Subpoena)]

p. 14

[MR. SCHUCHERT]

Now I know the complexity of this case. You may not feel that Mr. Turner cannot give a definitive answer but I have made in

[11] TR. 43.

general some study of this case and I know directly or indirectly the efforts which have been put into the investigation in this case. And for that reason, I have counselled Mr. Turner and I counsel him right now that unless and until he has a reasonable opportunity, because of the recent death in his family and largely because he was not the person familiar with these records and the person who is familiar with them is deceased— But until he has a reasonable opportunity to review the records that are in the possession of the Securities and Exchange Commission with Counsel, I don't want him testifying and making any statements which can later be misconstrued or can in any way affect him as being too vague or would contradict anything else that other records may show.

And for that reason, I have told Mr. Turner not to testify here today.

* * *

[MR. SCHIEF]

Now how much time would you propose, Mr. Schuchert, or do you request for a continuance from the time you have possession of the books and records?

[MR. SCHUCHERT]

A minimum period of two weeks after we get possession, or the joint right to utilize the records. I'm not asking— Mr. Turner's record, I think, indicates that he has always been most cooperative with the Washington Regional Office and with the Commission in general. We don't want to do anything which would impair your efforts. Nonetheless, the minimum that we would request is joint access to those records.

* * *

[Appendix B to Division's Supplemental Reply Brief Following Oral Argument Before the Commission (Transcript of testimony of Aldus H. Turner, Jr., taken on October 20, 1964 pursuant to Commission Subpoena)]

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EXAMINATION (Continued)

By Mr. Schief:

Q. Mr. Turner, pursuant to subpoena you appeared in this matter, this investigative matter on September 16, 1964, at which time an agreement was entered into by representatives of the Washington Regional Office and your counsel that you would have an opportunity to review certain books and records of Strathmore Securities before you would be able to testify in these investigative proceedings. Is that correct? A. That's true.

Q. And since that time you were given the opportunity for you and your counsel and any other person that you designated to review those books and records here in Pittsburgh. Is that correct? A. Yes.

Q. Now, are you prepared to testify?

Mr. Schuchert: Let me make a statement at this point, Mr. Schief. It may save us some trouble.

Although we are very appreciative of the agreement that the representatives of the Washington Regional Office made with us, and we do appreciate the inconvenience that they went to to make these records available, after consideration of this entire Popell matter, including such factors as the length of time that the Commission has been conducting an investigation, the complexity of the investigation, the complexity of the various transactions, after trying to piece together not only to Mr. Turner's satisfaction but to the satisfaction of counsel, the overall picture of transactions in the Popell matter,

and especially in light of the fact that Mr. Klein is deceased and he was the administrative officer of Strathmore Securities, I have come here today and I have advised my client, Mr. Turner, at this time to refuse to answer any questions with respect to the L. F. Popell matter on the grounds that they may tend to incriminate him.

Mr. Schief: Incidentally, before I go into it, we did keep some sort of record of the time spent by representatives of Mr. Turner and Strathmore Securities, and it shows that you did spend some time during the period beginning September 28th, 1964 and September 29th, an hour or so each day, and then again on October 5th, October 6th, and some other hours were spent on various other days up to and including last week, which was the week of October 12th.

Is that correct?

Mr. Schuchert: That's right.

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